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EDITOR'S NOTE

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No. 86-740-CFX
Status: GRANTED

Title: Omni Capital International, et al., Petitioners
v.
Rudolf Wolff & Co., Ltd., et al.

Docketed:
October 22, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Kutcher,Robert A.

Counsel for respondent: Elsen,Sheldon H., Paskoff,Elliot, Lipper,Jerome, Warner,Anita M.

Entry	Date	Note	Proceedings and Orders
1	Oct 22 1986	G	Petition for writ of certiorari filed.
2	Nov 12 1986		Letter from petitioner in compliance with Rule 28.1 filed.
3	Nov 24 1986		Brief of respondent James Gourlay in opposition filed.
4	Nov 24 1986		Brief of respondent Rudolf Wolff & Co., Ltd. in opposition filed.
5	Dec 3 1986		DISTRIBUTED. January 9, 1987
8	Jan 12 1987		REDISTRIBUTED. January 16, 1987
10	Jan 20 1987		REDISTRIBUTED. January 23, 1987
11	Jan 27 1987		Petition GRANTED.
			**********
13	Feb 7 1987		Order extending time to file brief of petitioner on the merits until April 3, 1987.
14	Apr 1 1987		Record filed.
15	Apr 1 1987		Certified copy of original record on appeal and proceedings, 11 volumes, box, received.
16	Apr 2 1987		Brief of respondents Point Landing, Inc., et al. in support of petition filed.
17	Apr 2 1987		Brief of petitioners Omni Capital Intl., et al. filed.
19	Apr 8 1987		Order extending time to file brief of respondent on the merits until May 29, 1987.
20	Apr 24 1987	D	Motion of respondents for divided argument filed.
21	May 18 1987		Motion of respondents for divided argument DENIED.
22	May 29 1987		Brief of respondent James Gourlay filed.
23	May 29 1987		Brief of respondent Rudolf Wolff & Co., Ltd. filed.
24	Jul 1 1987		CIRCULATED.
25	Jul 20 1987		SET FOR ARGUMENT. Tuesday, October 6, 1987. (3rd case).
26	Oct 6 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-740

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OMNI CAPITAL INTERNATIONAL, ET AL
Petitioners

v.

RUDOLF WOLFF & CO., LTD., ET AL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT A. KUTCHER
Counsel of Record
JOHN D. FRICKE
BRONFIN, HELLER, STEINBERG
& BERINS
650 Poydras Street
2500 Poydras Center
New Orleans, Louisiana 70130
Telephone: (504) 568-1888
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether, in a purely federal question case arising under the Commodities Exchange Act against alien commodities brokers, Federal Rule of Civil Procedure 4 (e) limits the personal jurisdiction of a federal district court to the same long-arm jurisdictional limitations imposed upon a state court in the state where the district court is located?

LIST OF OTHER PARTIES

In accordance with Supreme Court Rule 21.1 (b), petitioners submit the following list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed. The parties are, to-wit:

A. List of Petitioners

1. OMNI Capital International, LTD.
2. OMNI Captial Corporation
3. Northglen Capital Corporation
4. Richard Friedberg
5. Michael Stern

B. List of All other Parties

6. Point Landing, Inc. and Point Landing Fuel Corporation
7. William S. Smith and Ruby M. Smith
8. Frank A. George and Brenda A. George
9. Dennis M. Rosenberg and Joan Rosenberg
10. W. Lewis Ryder
11. Barry Minsky
12. Main Hurdman (formerly Main La Frentz & Co.)
13. Rudolf Wolff and Co., LTD.
14. James Gourlay

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners OMNI Capital International, LTD., OMNI Capital Corporation, Northglen Capital Corporation, Richard Friedberg and Michael Stern respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered July 25, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 795 F.2d 415. (Appendix A, p. A-1 through A-34) The opinions of the district court are not reported. (Appendix B, p. B-1 through B-42).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 25, 1986. No petition for rehearing was filed. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides, in

relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"No state shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

3. Section 6(c) of the Commodities Exchange Act codified at 7 U.S.C. §13a-1, provides, in relevant part:

"Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, . . . the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this

chapter, or any rule, regulation or order thereunder, and said Courts shall have jurisdiction to entertain such actions . . . ." Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found."

4. Section 6(d) of the Commodities Exchange Act codified at 7 U.S.C. §13a-2, provides in relevant part:

"The district courts of the United States, . . . shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with the respect thereto . . ."

Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts

business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

5. Section 18 of Title 7 of the United States Code, provides in relevant part:

"If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, . . . may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States . . ."

6. Section 25 of Title 7 of the United States Code, provides, in relevant part:

"The United States district courts shall have exclusive jurisdiction of

actions brought under this section . . .".

7. Federal Rule of Civil Procedure 4(e), provides, in relevant part:

"Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in the manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

8. Federal Rule of Civil Procedure 82 provides, in relevant part:

"These rules shall not be construed to extend ~~or~~ limit the jurisdiction of

the United States district court or the venue of actions therein.

9. Federal Rule of Civil Procedure 83 provides, in relevant part:

"In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

10. Federal Rule of Civil Procedure 1 provides, in relevant part:

"These rules govern the procedure of the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admirality, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

STATEMENT

On February 26, 1980, Point Landing, Inc. and Point Landing Fuel Corporation filed an action (hereinafter "Point Landing") in the United States District Court for the Eastern District of

Louisiana against Omni Capital International, Ltd. ("Omni International"), Omni Capital Corporation ("Omni Capital"), Richard Friedberg, Michael Stern, Barry Minsky, and Rudolf Wolff & Co., Ltd. ("Wolff"). Omni International and Omni Capital, in turn, cross-claimed Wolff and filed third-party complaints against James Gourlay and Main, Hurdman[1], formerly Main-LaFrentz, an accounting firm.

On February 12, 1981, William S. Smith, Jr. and Ruby M. Smith filed a

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[1]Main, Hurdman, an accounting firm, was third-partied based on an opinion letter furnished Omni and Northglen included in their investment program literature.

similar action (hereinafter "Smith") against Omni International, Omni Capital, Northglen Capital Corporation ("Northglen"), Richard Friedberg, Michael Stern, Barry Minsky, W. Lewis Ryder and Competex, S.A.[2]

In Smith, Omni International, Omni Capital, and Northglen filed third-party complaints against Wolff, James Gourlay and Main, Hurdman and filed a cross-claim against Competex, S.A.

On May 15, 1981, Frank J. George and Brenda A. George filed an action (hereinafter "George") against the

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[2]Competex, S.A., brokerage firm, is a corporation organized under the laws of the nation of Switzerland. It is defunct and has never appeared in this litigation.

identical defendants named in the Smith action. Likewise, identical third-party complaints were filed.

The above mentioned cases[3] were consolidated for resolution. In each of the consolidated cases, plaintiffs originally sought damages under the Securities Exchange Act and the rules promulgated thereunder. Subsequent to consolidation of this matter, plaintiffs amended their complaints to include a claim for damages under Sections 4b and 9b of the Commodities Exchange Act

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[3]Another suit filed by Dennis M. Rosenberg and Joan Rosenberg against the same defendants named in Smith and George above on November 25, 1981 was also consolidated with the aforementioned actions.

("Commodities Act") (7 USC §§6b and 13b). In all the cases, plaintiffs allege that Omni International, or an agent thereof, contacted them concerning an investment program offered by Omni Capital. The program entailed the purchase and sale of options and contracts in silver commodity futures on the London Metals Exchange through the use of trading accounts established with Omni International or Omni Capital and/or Northglen.

Depending on the individual plaintiffs involved, Wolff and/or Competex S. A. acted as principal in the London Metals Exchange. These principals would actually buy or sell options and contracts in the silver commodity futures for the account of the various plaintiffs. Wolff and/or

Competex would, in turn, send confirmation slips to the various parties directly notifying them of the London trades.

In the instant consolidated litigation, Omni International, Omni Capital and/or Northglen third-partied or cross-claimed Rudolf Wolff, Competex S.A. and James Gourlay, a London resident, a former principal or agent of both Competex and Wolff. The basis of the third party complaints and cross-claims is that if any liability results to the third party plaintiffs, it was not a result caused by Omni or Northglen, but the improper trading activities of the various London brokers. Both Wolff and Gourlay, as

well as Barry Minsky, filed motions to dismiss.

Motions seeking dismissal of the claims on grounds of lack of personal jurisdiction were filed by Wolff, James Gourlay and Barry Minsky. Accompanying motions seeking dismissal of the various securities claims under sections 10 (b) and 20 of the Exchange Act and 17 of the Securites Act were also filed. The District Court, on May 16, 1983, granted the defendants' motion to dismiss, leaving only those claims asserted pursuant to the Commodities Exchange Act.

Additionally, the District Court, on May 16, 1983, denied the motions of Wolff, Gourlay and Minsky to dismiss for lack of personal jurisdiction. The district court held that the nationwide service of process provisions of the

federal securities and commodities laws required only that Wolff and Gourlay have sufficient contacts with the United States (not Louisiana) to comport with due process and that a prima facie case for personal jurisdiction had been established.

Shortly thereafter, the Fifth Circuit issued its opinion in DeMelo v. Touche Marine, Inc., 5th Cir. 1983, 711 F.2d 1260. In DeMelo, the Fifth Circuit held that when a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is utilized to serve an out-of-state defendant, Rule 4(e) requires that the state's standard of amenability to jurisdiction apply. Id. at 1266.

Wolff and Gourlay, relying on DeMelo, then renewed their objections to the court's personal jurisdiction. On reconsideration, the district court held that: (1) the CEA preempts private actions under § 10b of the 1934 Act and Rule 10b-5; (2) the CEA does not expressly or impliedly authorize nationwide service of process in private actions; (3) DeMelo requires an application of the Louisiana long-arm statute in private actions under the CEA; and (4) neither Wolff nor Gourlay is subject to the jurisdiction of Louisiana state courts. The court therefore dismissed the claims against Wolff and Gourlay for lack of personal jurisdiction. The Fifth Circuit decided to hear this appeal en banc without the

panel to which the consolidated appeals were assigned first issuing an opinion.

On appeal, a divided Court of Appeals affirmed. The Fifth Circuit recognized that the CEA affords plaintiffs their exclusive remedy. Further, the Fifth Circuit held that: (1) The CEA does not expressly or impliedly authorize nationwide service of process in private actions; (2) in the absence of specific provisions to the contrary, Rule 4(e) adopts the state provisions on amenability to service and on manner of service requiring the application of the Louisiana long-arm statute in private actions under the CEA; and (3) in light of the language of Rule 4(e) of the Federal Rules of Civil Procedure, and absent specific congressional authority to the contrary,

a federal district court has no personal jurisdiction over a defendant who cannot be reached by a long-arm statute of the state in which the district court sits.

Judge Wisdom, joined by Chief Judge Clark and Judges Rubin, Politz, Johnson and Williams, concurred in part and dissented in part on the grounds that nationwide service of process should be applied in private actions under the Commodities Exchange Act. Judge Wisdom observed that the majority's conclusion did violence to the structure of the American polity. In addition, Judge Wisdom stated that in a diversity action, a federal court sits as a state court and is to be guided by principles enunciated in International Shoe Co. vs. Washington, 326 U.S. 310 (1945). Judge Wisdom, however, further concluded that

no such reason exists when the federal court sits as an intregal part of national system of courts responsive to federal law and federal objectives.

REASONS FOR GRANTING THE PETITION

This case involves an important question concerning the submission of a federal district court to state jurisdictional limitations in a purely federal question matter arising under the Commodities Exchange Act (hereinafter referred to as "CEA"). The decision of the Fifth Circuit rendered July 25, 1986, effectively trammels the authority of a federal district court to adjudicate a private action arising under the CEA against an alien commodities broker for violations of that act and the regulations created thereunder. As observed by Judge Wisdom

in his dissent from the decision of the Fifth Circuit, this result does violence to the broad scope of the CEA.

Despite the Fifth Circuit's cursory findings to the contrary, the very provisions of the CEA strongly support the application of nationwide process and jurisdictional standards to private actions brought under this provision. Secondly, the decision of the Fifth Circuit imposing state jurisdictional limitations on a private action under the CEA is contrary to this Honorable Court's decision in Merrill Lynch, Pierce, Fenner and Smith vs. Curran, 456 U.S. 353 (1982) ("Curran").

Finally, the constitutional authority of a federal court to adjudicate purely federal claims demands the application of nationwide process

and jurisdictional standards in a private action brought under the CEA. Any other result immunizes an alien defendant from having to answer to the court for his violations of federal law.

Each of these reasons is discussed more specifically below.

1. The Fifth Circuit premised its decision on the principle that, absent a rule or statute to the contrary, Federal Rule of Civil Procedure 4(e) "permits" a federal court to exercise jurisdiction over only those defendants who are subject to the jurisdiction of the courts of the state in which the court sits. George vs. Omni Capital Intern., Ltd., 795 F.2d 415, 419 (5th Cir. 1986); Appendix A, p. A-7. In its review of the CEA, the Fifth Circuit concluded that the Act's provisions gave no basis

for the extension of nationwide process and jurisdiction to private actions under the CEA.

We suggest that the rationale of the Fifth Circuit which imposes state legislative restraints on a federal court's authority in a purely federal question case involving a strong national policy such as that embodied in the CEA, does violence to the background of the Act and the objectives of Congress. As observed by the Senate in its report on the Commodities Futures Trading Commission Act of 1974, the economic purpose of futures trading, its peculiar needs and effect upon the cash pricing system of those commodities which are traded as futures are often misunderstood by those both within and without the industry. Senate Rep. No.

93-1131 93rd Cong. 2d. Sess. 11 (1974). As this report continues, "often equally misunderstood is the role of governmental regulation of this industry." Id. at page 11.

Over a century ago, irresponsible trading and lack of effective market regulation stirred farm resentment and strong opposition to futures trading altogether. From these abuses stemmed repeated efforts by state legislatures from 1860 onward to abolish futures trading. Senate Rep. No. 93-1131, 93rd Cong. 2d. Sess. 13 (1974). Demands for federal regulation of the industry were insistent.

Under federal legislation in 1936, the federal regulatory scheme over commodities futures trading was renamed the Commodities Exchange Act and its

regulatory coverage was broadened. In fact, extensive additional authority was granted to deal with market abuses by traders generally, to prosecute price manipulation as a criminal offense, to curb excessive speculation by the large market operator, and to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud, and ficticious transactions in futures which were seriously impairing the services of the market. Id. at pages 13-14.

A fundamental purpose of the 1974 amendments to the CEA was to insure fair practice and honest dealing on the commodities exchanges and to provide a measure of control over these forms of speculative activity which too often demoralized the markets to the injury of

producers and consumers and the exchanges themselves. Id. at page 14; Tamari vs. Bache and Co. (Lebanon) S.A.L., 730 F.2d 1103, 1106 (7th Cir. 1984), Deaktor vs. L. D. Schreiver and Co., 479 F.2d 529, 534 (7th Cir. 1973); To effectuate this purpose, the CEA creates a comprehensive regulatory scheme including numerous enforcement provisions i.e. 7 U.S.C. Sections 13a-1, 13a-2, and 18. Under each of these enforcement provisions of the CEA, Congress expressly vested federal district court with authority to adjudicate claims brought under the CEA. Combined in that vestiture was the expressed grant of nationwide process and jurisdictional authority of the

federal court to hear claims against those who would violate the Act's provisions.

Even the authority given a state attorney general to enforce the provisions of the CEA, e.g. 7 U.S.C. §13a-2, includes the grant of nationwide process and jurisdictional authority.. Where Congress would grant a state attorney general access to the nationwide jurisdictional authority of the federal court to prosecute claims against violators of the CEA, the decision of the Fifth Circuit to impose state jurisdictional limitations on federal district court in adjudicating a private action under the CEA is contrary to the scheme created by Congress. The clear intention of Congress was to create the private

action as a potent and viable enforcement tool as part of its regulatory scheme.

In one stroke, the Fifth Circuit has declared federal district courts incompetent to hear purely federal matters arising under the CEA against an alien commodity broker who is alleged to have violated the provisions of the CEA. This result cripples a viable tool which Congress intended to protect and defend the integrity of its regulatory scheme.

In summary, the Fifth Circuit's finding that the CEA is silent as to service of process over private actions is far too narrow. The impact of this decision leaves individual commodities investors without a remedy against alien commodities brokers. That was not the

intention of Congress. The decision of the Fifth Circuit must be reversed in this respect.

2. In addition to the authority inferred from the expressed provisions of the Act for the application of nationwide process and jurisdiction in private actions under the CEA, it is equally clear that the decision of the Fifth Circuit is contrary to this Court's decision in Curran. In Curran, this Honorable Court determined that a private action was a significant enforcement tool, equal to others under the act, to be used in the panoply of weaponry to battle violations of Congress' regulation of commodities futures trading. As observed by this Court in Curran, in pertinent part:

> "[T]hroughout the long history of federal regulation of future trading

> it has been federal law that has imposed a stringent duty upon exchanges to police the trading activities in the markets that they are authorized by statute to regulate. Since the amendments to the original legislation regulating futures trading consistently have strengthened that regulatory scheme, the elimination of a significant enforcement tool would clash with this legislative pattern. We therefore may not simply assume that Congress silently withdrew the pre-existing private remedy against exchanges. "456 U.S. at 393-94, 72 L. ed. 2d at 210-211.

The decision of the Fifth Circuit renders the private action under the CEA impotent to address violations of an alien commodities broker under the Act. This result is contrary to this Court's own assessment of the importance and scope of this private remedy.

As an additional consideration, §25 of Title 7 of the United States Code which codifies the private action under the Commodities Exchange Act supports

the application of nationwide process and jurisdiction to such private actions. Although §25 was not enacted until after the filing of the present suit, its provisions are important to consider. The Fifth Circuit examined §25 only to find no express provision for nationwide process and jurisdiction. An examination of that section, however, reveals that its provisions comport with the tenor set by Congress throughout the CEA.

Under §25, Congress expressly stated that a private cause of action under the CEA shall be brought <u>exclusively</u> in a federal district court. A similar provision is not included in any of the other enforcement tools under the CEA

although courts have implied such exclusivity. Where Congress expressly intended for private actions to be brought exclusively in a federal district court, the imposition of state court jurisdictional limitations does violence to Congress' clear intentions.

The Fifth Circuit's decision reduces a federal district court's jurisdictional authority to that of a state court sitting in its locale. That was not the intention of Congress. Congress intended to grant the federal court exclusive authority to adjudicate private claims for violations of the CEA. The Fifth Circuit's adoption of state standards is completely contrary to Congress' regulatory scheme under the CEA.

As stated above, Judge Wisdom observed that the result of the Fifth Circuit does violence to the polity of the federal court. George vs. Omni Capital Intern., Ltd., 795 F.2d 415, 428 (5th Cir. 1986); Appendix A, p. A-22. Such decision effectively immunizes an alien commodities broker from having to answer for his violations through a private action under the CEA. Such result is not supported by the provisions of the CEA and is contrary to this Honorable Court's own recognition of the broad scope of that regulatory scheme.

3. Finally, the Fifth Circuit's decision imposes upon a federal district court the same jurisdictional limitations restraining a state court even though this matter involves a

purely federal question under the CEA. The Fifth Circuit even recognized the anamoly created by its decision to tie personal jurisdiction in a federal question case to the long arm statute of the state in which the federal court sits. George vs. Omni Capital Intern., Ltd., supra at 795 F.2d 422; Appendix A, p. A-12. Notwithstanding this fact, the Fifth Circuit felt compelled to apply the state standard because of its interpretation of the language rule 4(e).

We suggest that the appropriate inquiry to be made in a federal court when the suit arises from federally created rights under the CEA is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment. This

national contacts theory has been recognized by numerous courts. Chrysler Corp. vs. Fedders Corp., 643 F.2d 1229, 1238 (6th Cir. 1981); Centronics Data Computer Corp. vs Mannesmann, A.G., 432 F Supp 659 (D.N.H. 1977); Cryomedics, Inc. vs. Spembly, Ltd., 397 F Supp 287 (D. Conn. 1975); C. Holt vs. Klesters Rederi A/S, 355 F Supp 354, 357 (W.D. Mich. 1973); Kramer vs. Scientific Control Corp., 365 F Supp 780, 787 (E.D. Pa. 1973); First Flight Co. vs. National Car Loading Corp., 209 F Supp 730, 737 (E.D. Tenn. 1962); Cf. Handley vs. Indiana and Michigan Electric Co., 732 F.2d 1265, 1272 (6th Cir. 1984).

The decision of the Fifth Circuit interprets the "under the circumstances"

language of rule 4(e) as requiring the use of state jurisdictional provisions even though the federal court is deciding only federal questions. Such a result effectively immunizes an alien commodities broker from a private action under the CEA. As the court in Centronics Data states, in pertinent part:

> The traditional notions of justice and fair play should not be used to extend a cloak of immunity over deliberate torts merely because the defendant is an alien corporation. To do so would be to deny justice and fair play to the plaintiff.

Centronics Data Computer Corp. vs. Mannesmann, A.G. supra at 432 F Supp 667. To aggregate the national contacts of an alien defendant in order to obtain personal jurisdiction may be neither

unfair nor unreasonable when assessed by the Fifth Amendment standards. See Max Daetwyler Corp. vs. R. Meyer, 762 F.2d 290 (3rd Cir. 1985).

In the present case, the district court has already found that the contacts of both Wolff and Gourlay with the United States are sufficient to satisfy the due process requirements under the Fifth Amendment. (Appendix B, pp B-14 through B-20). The district court later found that these third party defendants did not have sufficient contacts with Louisiana to permit the exercise of personal jurisdiction under state jurisdictional standards established by the Fourteenth

Amendment. (Appendix B, p. B-19). If the state standard is applied in this purely federal question case, these defendants are effectively immune from private suit under the CEA in Louisiana.

Where courts have uniformly recognized the constitutionality of the national contacts theory, the application of state jurisdictional standards by the Fifth Circuit is erroneous. The CEA requires a broad interpretation of its enforcement provisions, including those which relate to the private action. The decision of the Fifth Circuit improperly divests a federal court of authority permitted by the Constitution and intended by Congress.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT A. KUTCHER,
Counsel of Record
JOHN D. FRICKE
BRONFIN, HELLER, STEINBERG
and BERINS
650 Poydras Street, Ste 2500
New Orleans, Louisiana 70130
Telephone: (504) 568-1888
Attorneys for Petitioners

October 20, 1986

APPENDIX A

FRANK J. GEORGE and BRENDA A. GEORGE,

Plaintiffs,

v.

OMNI CAPITAL INTERNATIONAL, LTD., ET AL.,

Defendants-Third Party Plaintiffs-Appellants,

v.

RUDOLF WOLFE & CO., LTD., and JAMES GOURLAY,

Third Party Defendants-Appellees.

DENNIS M. ROSENBERG and JOAN ROSENBERG,

Plaintiffs,

v.

OMNI CAPITAL INTERNATIONAL, LTD., ET AL.,

Defendants-Third Party Plaintiffs-Appellants,

v.

RUDOLF WOLFE & CO., LTD., and JAMES GOURLAY,

Third Party Defendants-Appellees.

Filed July 25, 1986

Before: Clark, Chief Judge, and Wisdom, Gee, Rubin, Reavley, Politz, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.*

*Due to his death on March 27, 1986, Judge Albert Tate, Jr. did not participate in this decision.

Per Curiam; Dissent by Judge John Minor Wisdom

Appeals from the United States District Court
for the Eastern District of Louisiana
Adrian G. Duplantier, District Judge, Presiding

OPINION

PER CURIAM:

This appeal presents two important issues. First, does the Commodities Exchange Act ("CEA") provide an exclusive cause of action arising out of the commodities futures transactions the plaintiffs engaged in here, preempting claims under federal securities laws? Our answer must be "Yes". The second question arises because of the absence of any provision in the CEA for nationwide service of process such as that which is explicitly stated in the Securities Exchange Act of 1934 ("1934 Act"). In this federal question case must personal jurisdiction[1] be obtained in accordance with Federal Rule of Civil Procedure 4(e), by applying the long-arm statute of the state in which the district court sits? Or, may a defendant's contacts throughout the country be aggregated to permit jurisdiction to be asserted over a defendant who could not be reached by the state's long-arm statute? The district court applied Rule 4(e) and dismissed the claims against two of the defendants for lack of personal jurisdiction. We affirm the judgment of the district court.

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[1]"The concept of personal jurisdiction comprises two distinct components: amenability to jurisdiction and service of process. Amenability to jurisdiction means that a defendant is within the substantive reach of a forum's jurisdiction under applicable law. Service of process is simply the physical means by which that jurisdiction is asserted". *DeMelo v. Toche Marine, Inc.*, 5 Cir. 1983, 711 F.2d 1260, 1264 (citations omitted).

I.

The plaintiffs in these four consolidated actions are two Louisiana corporations, Point Landing, Inc. and Point Landing Fuel Corporation (collectively referred to as "Point Landing"), and individual investors William and Ruby Smith ("Smith"), Frank and Brenda George ("George"), and Dennis and Joan Rosenberg ("Rosenberg"). In the Point Landing action the defendants are: two New York corporations, Omni Capital International, Ltd. and Omni Capital Corporation (collectively referred to as "Omni"); their broker, Rudolph Wolff & Co. Ltd., ("Wolff"), a British corporation; and certain officers or employees of Omni, Richard Friedburg, Michael Stern, and Barry Minsky. Omni impleaded James Gourlay, Wolff's representative, and Main, Hurdman, an accounting firm. In the Smith, George, and Rosenberg suits, the defendants are Omni, Northglen Capital Corporation ("Northglen"), Richard Friedburg, Michael Stern, Barry Minsky, and Competex, S.A., a now defunct Swiss company that has not appeared in the case. In the Smith and George suits, Omni and Northglen filed third-party complaints against Wolff, Gourlay, and Main Hurdman. Wolff had no relationship with Smith, George, or Rosenberg and is not a defendant in their actions.[2]

The complaint alleges that the defendants, by making misrepresentations concerning their "investment program", fraudulently induced the plaintiffs to invest in silver straddle[3] commodity futures traded on the London Metals Exchange through discretionary trading accounts. Wolff and Competex handled these trades. Earlier, Wolff had approached Omni in New York to solicit Omni's business through Gourlay, a former director who acted as an agent for Wolff. Wolff billed Omni over 105,000 British pounds for commissions, part of which went to Gourlay.

[2]In short, neither Wolff nor Gourlay is a party in the Rosenberg action; Wolff is a defendant in the Point Landing action and a third-party defendant in the other two actions; Gourlay is a third-party defendant in three actions.

[3]A straddle is the simultaneous purchase and sale of futures contracts, deliveries to be made in different months. Investors have attempted to use straddles in stock options or commodities to generate capital gains and ordinary losses. *Commodity Exchange, Inc. v. CFTC* [1980-1982] Comm. Fut. L. Rep. (CCH) ¶ 21,445 (S.D.N.Y. 1982); 1 P. Johnson, *Commodities Regulation* § 1.15 at 48, 49 (1982).

The plaintiffs contend that Omni had meetings and did extensive advertising in which Omni represented that participation in its investment program would entitle the investors to federal income tax deductions on losses incurred, in addition to future profits. Unfortunately for the investors, the Internal Revenue Service disallowed the plaintiffs' deductions on the ground that the trades in London were not "bona fide, arm's length" transactions. The IRS concluded that the London Metals Exchange is not a public market and that its members were setting prices. All parties agree that the transactions involved "commodities" for purposes of federal law; plaintiffs allege, but Omni denies, that these were also "securities".

The original complaints allege violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77z(a), §§ 10b and 20 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78t, Rule 10b-5, 17 C.F.R. § 240.10b-5, and the Louisiana Blue Sky law. The district court dismissed the plaintiffs' claims under the 1933 Act and under § 20 of the 1934 Act. The plaintiffs do not appeal from those dismissals.

In *Rivers v. Rosenthal & Co.*, 5 Cir. 1980, 634 F.2d 774, *vacated*, 456 U.S. 968 (1982), this Court held that the CEA affords no implied private right of action. The plaintiffs' original complaints therefore allege no violations of federal commodities law. While these actions were pending, the Supreme Court recognized an implied private right of action under the CEA and vacated our judgment in *Rivers. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 1982, 456 U.S. 353. In the light of *Curran*, the plaintiffs amended their complaints to allege violations of §§ 4b and 9(b) of the CEA, 7 U.S.C. §§ 6b, 13b.[4]

Wolff and Gourlay contest the court's jurisdiction over their per-

[4]Omni never amended its third party complaints to add the commodities law counts. Third party defendants may, however, move to dismiss the primary complaint for failure to state a claim. Fed. R. Civ. P. 14(a).

Transactions on the London Metals Exchange have held outside the scope of § 4b of the CEA. *Kleinberg v. Bear Stearns & Co.*, [9184-86] Comm. Fut. L. Rep. (CCH) ¶ 22,613 (S.D.N.Y. 1985); *de Atucha v. Commodity Exchange, Inc.*, S.D.N.Y. 1985, 608 F. Supp. 510 (1985). The plaintiffs' claims may however be cognizable under § 4c(b) of the Act, 7 U.S.C. § 6c(b) and Regulation 32.9, 17 C.F.R. § 32.9, or under Regulation 30.02, 17 C.F.R. § 30.02.

sons. The district court initially considered the defendants' contacts with the United States as a whole and found that the aggregate contacts were sufficient to subject both parties to the court's jurisdiction.

Shortly thereafter this Court issued its opinion in *DeMelo v. Toche Marine, Inc.*, 5th Cir. 1983, 711 F.2d 1260. In *DeMelo* the question was: "[W]hat standard of amenability [to personal jurisdiction] should apply when the plaintiff's claims are founded in part upon federal question jurisdiction, but service is effected under a state long-arm statute?" 711 F.2d at 1265. The Court noted that the two most recent Fifth Circuit cases on this point, *Lapeyrouse v. Texaco*, 5 Cir. 1982, 693 F.2d 581, and *Burstein v. State Bar of California*, 5 Cir. 1983, 693 F.2d 511, "decided only three days apart, give different answers".[5] 711 F.2d at 1265. Writing for the *DeMelo* Court, Judge Gee chose to follow *Burstein*, holding that "when a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is therefore utilized to serve an out-of-state defendant, Rule 4(e) requires that the state's standard of amenability to jurisdiction apply". *Id.* at 1266.

Wolff and Gourlay, relying on *DeMelo*, then renewed their objections to the court's personal jurisdiction. The district court held that: (1) the CEA preempts private actions under § 10b of the 1934 Act and Rule 10b-5 (2) the CEA does not expressly or impliedly authorize nationwide service of process in private actions; (3) *DeMelo* requires an application of the Louisiana long-arm statute in private actions under the CEA; and (4) neither Wolff nor Gourlay is subject to the jurisdiction of Louisiana state courts. The court therefore dismissed the claims against Wolff and Gourlay for lack of personal jurisdiction. Because our opinions on the issue of personal jurisdiction in federal question cases, "[l]ike a Tower of Babel . . . spoke in irreconciliable voices", *DeMelo*, 711 F.2d at 1268, the Court decided to hear this appeal en banc without the panel to which the consolidated appeals were assigned first issuing an opinion.

[5] *Lapeyrouse* relied on *Terry v. Raymond International, Inc.*, 5 Cir. 1982, 693 F.2d 581 and *Lone Star Package Car Co. v. Baltimore & Ohio R.R. Co.*, 5 Cir. 1954, 212 F.2d 147. *Burstein* distinguished *Terry* and *Lone Star*.

[1] We agree with the district court. The plaintiffs can recover, if at all, only under the CEA. Absent a rule or statute to the contrary, Federal Rule of Civil Procedure 4(e) permits a federal court to exercise jurisdiction over only those defendants who are subject to the jurisdiction of courts of the state in which the court sits. Because the plaintiffs do not challenge the district court's findings that Wolff and Gourlay are not subject to the jurisdiction of Louisiana state courts under that state's long arm statute, we affirm the dismissal of all claims against Wolff and Gourlay.

II.

[2] We would not need to decide the question of amenability to personal jurisdiction by service under the Louisiana long-arm statute, *if* the commodity trades here were governed by the securities laws. Wolff and Gourlay would then be subject to the court's jurisdiction under § 27 of the 1934 Act, which permits service of process "wherever the defendant may be found". 15 U.S.C. § 78aa. Federal courts may exercise personal jurisdiction under § 27 of the 1934 Act to the limits of due process. *Leasco Data Processing Equipment Corp. v. Maxwell*, 2 Cir. 1972, 468 F.2d 1326, 1340 (Friendly, J.).

A.

[3] Until 1974 the CEA applied only to transactions in certain agricultural commodities. *See* 7 U.S.C. § 2 (1970). Courts disagreed over which commodities transactions were covered by the securities statutes, and some transactions fell into a gap between federal securities and commodities laws.

The Commodities Futures Trading Commission Act of 1974 ("CFTA"), Pub. L. No. 93-463, 88 Stat. 1389, "the first complete overhaul of the Commodity Exchange Act since its inception", provides a "comprehensive regulatory structure". H.R. Rep. No. 975, 93d Cong., 2d Sess. 1. Congress intended the 1974 amendments to "fill all regulatory gaps" while "avoid[ing] unnecessary, overlapping and duplicative regulation." 120 Cong. Rec. H34736 (Oct. 9, 1974) (remarks of House Agriculture Committee Chairman Robert Poage); 120 Cong. Rec. S34997 (Oct. 10, 1974) (remarks of Senate Agriculture Committee Chairman Herman Talmadge).

Section 2(a)(1)(A), set out in the margin, is the critical provision of the CFTA.[6] The statute confers on the Commodities Futures Trading Commission ("CFTC") exclusive jurisdiction over "accounts . . . involving contract of sale of a commodity for future delivery traded or executed on a contract market designated pursuant to § 7 of this title or any other board of trade, exchange, or market". The London Metals Exchange, although not a designated exchange, is a "board of trade, exchange, or market" within the meaning of § 2. This Court has held that the CFTC has regulatory authority over trading in "London options". *CFTC v. Miller*, 5 Cir., 1978, 570 F.2d 1296, 1299.

[4] The legislative history of § 2 indicates that the CFTC has exclusive jurisdiction over the transactions at issue. Representative Poage, Chairman of the House Agriculture Committee, remarked from the House floor:

> I wish to emphasize that the words "any other board of trade, exchange or market" were included . . . only for the purpose of giving the Commodity Futures Trading Commission jurisdiction over future contracts purchased and sold in the United States and executed on a foreign board of trade, exchange, or market. This grant of exclusive jurisdiction is not to be construed as preempting the jurisdiction of the Securities and Exchange Commission over securities . . . traded on any national securities exchange or any other U.S. securities market.

[6]Section 2(a)(1)(A) provides:

> [T]he Commission shall have exclusive jurisdiction, except to the extent otherwise provided in § 2(a) of this title with respect to accounts, agreements . . . and transactions involving contract of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to § 7 of this title or any other board of trade, exchange, or market". . . . [N]othing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.

7 U.S.C. § 2.

120 Cong. Rec. H34, 737 (1974). The Supreme Court has concluded that Section 2 gives the CFTC "exclusive jurisdiction over commodity futures trading. The purpose of the exclusive-jurisdiction provision in the bill passed by the House was to separate the functions of the Commission from those of the Securities and Exchange Commission and other regulatory agencies". *Curran*, 456 U.S. at 386. *See also* Markham, "Regulation of International Transactions Under the Commodity Exchange Act", 48 Fordham L. Rev. 129, 133 (1979).

Point Landing argues that the SEC retained jurisdiction over the transactions under the saving clause of § 2:

> [E]xcept as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.

As originally passed in the House, the bill provided that "nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission". H.R. 1131, 93d Cong., 2d Sess. § 201 (1974).[7] The Senate added the phrase "except as hereinabove provided" to ensure that "the [CFTC's exclusive] jurisdiction, where applicable, supersedes state as well as federal agencies". S. Rep. No. 1131, 93d Cong. 2d Sess. 6 (1974). The Senate version was adopted by the Conference Committee and enacted into law. According to the Conference Report, § 2(a)(1)(A) "preempt[s] the field insofar as futures regulation is concerned". H.R. Rep. No. 1383, 93d Cong. 2d Sess. (1974).

Congress has not altered the CFTC's jurisdiction over discretionary commodity accounts since 1974. The Senate Agriculture Committee has reported that "[t]he basic conclusion reached in 1974

[7]The report accompanying the House bill stated that the CFTC would have exclusive jurisdiction over commodities futures traded on a contract market. H.R. Rep. No. 975, 93rd Cong. 2nd Sess. 28 (1974).

that there should be a single regulatory agency responsible for futures trading is as valid now as it was then". S. Rep. No. 850, 95th Cong. 2d Sess. 22 (1978). A report accompanying the House version of the 1982 amendments to the CEA explained that "the [CFTC] would continue to have exclusive jurisdiction over foreign futures transactions traded in the United States". H.R. Rep. No. 97-565(I), 97th Cong. 2d Sess. (1982).

B.

[5] The plaintiffs contend that even if the SEC lacks jurisdiction to regulate the transactions at issue, the courts may grant relief based on securities laws and regulations. Courts faced with this question have reached three different results.

(1) Some courts and commentators, many but not all writing before 1982, adopt the plaintiffs' position. *Peavey Co. v. Mitchell*, W.D. Okla., 1983, [1983-84] Fed. Sec. L. Rep. (CCH) ¶ 99, 593; *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, D. Nev. 1980, 492 F. Supp. 1345; Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J Corp. L. 217, 310 (1976); Note, *The Continued Availability of Private Actions for Fraud Under the Securities Statutes in Commodity-Security Transactions*, 22 B.C.L. Rev. 335 (1981). The Court of Appeals for the Ninth Circuit has approved this result in dictum. *Mordaunt v. Incomco*, 9 Cir. 1982, 686 F.2d 815, *cert. denied*, 105 S.Ct. 801 (1985). *Mordaunt* cites the Supreme Court's *Curran* opinion as authority for the proposition that the CEA does not preempt private actions under the securities laws. 686 F.2d at 816. The *Curran* opinion however, does not address the preemption of private securities actions. The Court found that an implied right of action under the CEA survived the 1974 amendments. Because the 1974 amendments dramatically expanded the scope of the commodities laws to avoid "overlapping and duplicative" coverage, it appears to us that *Curran* does not support the proposition for which it is cited in *Mordaunt*. *See* T. Russo, *Regulation of the Commodities, Futures, and Options Markets* § 10.20, at 10-54 (1983).

(2) Other courts, including the district court in this case, have concluded that plaintiffs may recover under "self-executing" sections of the securities acts but not under § 10(b) of the 1934 Act or

under other sections that proscribe activities contravening SEC regulations. *American Grain Association v. Canfield, Burch & Mancuso*, W.D. La. 1982, 530 F. Supp. 1339; *Westlake v. Abrams*, N.D. Ga. 1980, 504 F. Supp. 337, 345.

(3) Still other courts hold that plaintiffs may not recover under any securities statute or regulation. *Mallen v. Merrill Lynch, Pierce, Fenner & Smith*, N.D. Ga. 1985, 605 F. Supp. 1105, 1114; *Bartels v. International Commodities Corp.*, D. Conn. 1977, 435 F. Supp. 865, 869; *Fairchild, Arabatzis & Smith, Inc. V. Prometco Co.*, S.D.N.Y. 1979, 470 F. Supp. 610, 614.

[6] We hold that the CEA affords plaintiffs their exclusive remedy.[8] Any other result would frustrate the intent of Congress to preempt the field insofar as futures regulation is concerned. Congress intended the 1974 amendments to create a uniform regulatory scheme. Private actions under the securities laws might engraft policies and standards inconsistent with those developed under the CEA. We find, moreover, no reason to rely on securities laws when the CEA now affords a full range of remedies, including an express private right of action. *See* T. Russo, § 10.20, at 10-58-59.

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[8] The SEC, in an amicus brief submitted at the Court's request, agrees that the CFTC has exclusive regulatory jurisdiction over individual discretionary accounts, by virtue of amendments to the CEA enacted in the Commodities Futures Trading Commission Act of 1974. "[W]here the broker and manager of a discretionary commodity account receive commissions based on trade prices rather than share in the customer's profits or losses, the account is not a security within the meaning of the federal securities laws." SEC brf. at 2.

The CFTC, in its amicus brief, which was also requested by the Court, concludes that both the plain language and the legislative history of the 1974 amendments to the Act make clear that Congress intended Section 2(a)(1) (now Section 2(a)(1)(A)) of the Act, 7 U.S.C. § 2, to preclude application of federal securities laws to all transactions involving futures and options on futures including foreign-exchange traded futures contracts, the options on such contracts and the discretionary commodity accounts that are involved in this case.

It is unnecessary for the Court to decide whether the accounts in question are securities, since in any event the CEA is preemptive.

The Court appreciates the efforts expended by the SEC and the CFTC and the excellence of their briefs.

The securities acts contain broad and flexible concepts such as "manipulative acts and practices" and "just and equitable principles of trade". 15 U.S.C. § 78(f)(b)5. The CEA permits the CFTC to designate a contract market in a particular commodity only if the new futures contract "will not be contrary to the public interest". 7 U.S.C. § 7(g).

> These fluid concepts not only require the continual exercise of judgment and discretion, but, to provide effective regulation, they must be administered on a relatively consistent and uniform basis. It is reasonable to assume that Congress, having created a regulatory agency under the same statute, intends for that agency to exercise the requisite judgment and to provide the needed uniformity. . . . Conversely, once Congress has directed the agency not to formulate regulatory policy with respect to a particular activity . . . no public benefit can be discerned from allowing private actions for private gain, which may evolve new policies or standards at variance with the congressional intent, under the preempted agency's governing statute.

Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 35-36 (1976).

The plaintiffs appeal only the dismissal of their claim under § 10(b) of the 1934 Act. We have, therefore, no occasion to hold that the CEA also preempts actions under "self-executing" sections of the securities acts.

III.

[7] On first considering the subject of the amenability of an out-of-state defendant, especially an alien defendant, to the personal jurisdiction of a federal court hearing a federal question case, one's natural reaction does not necessarily coincide with the conclusions one may be forced to reach in the light of the decided cases and commentary. It may seem anomalous to tie personal jurisdiction in a federal question case to the long-arm statute of the state in which the federal court sits. In a diversity case where the plaintiff asserts a local claim, a federal court using a state long-arm statute, as required by Rule 4(e), is bound by the limits of the fourteenth

amendment. The court must make certain that the forum state does not unduly encroach on the interests of a sister state or of the nation. In a federal question case, however, where a federal court is adjudicating a federal claim involving a federal statute, concern for limiting the reach of a state is irrelevant. The court determines rights and liabilities under a uniform, national law. If fairness or due process is an issue, it is the due process standard of the fifth amendment, not the fourteenth amendment, that must be met. A heavy weight of authority, however, accepts the anomaly. See Note, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Cases*, 70 Cal. L. Rev. 686 (1982).

A.

[8] To start at the logical beginning, the unmalleable principle of law that is unyielding to legal blandishments is that federal courts may exercise only so much of their Article III jurisdiction as they are granted by Congress. They must ground their personal jurisdiction on a federal statute or rule. "As courts of limited jurisdiction, the federal courts possess no warrant to create jurisdictional law of their own." Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 711 (Powell, J., concurring). *See also Burstein*, 693 F.2d at 514; Rebozo v. Washington Post Co., 5 Cir. 1975, 515 F.2d 1208, 1211; Wells Fargo & Co. v. Wells Fargo Express Co., 9 Cir. 1977, 556 F.2d 406, 414 (collecting authorities).

[9] In rare instances there are gaps in the law enabling a federal court to fashion federal common law. We decline to do so here because of the nature of personal jurisdiction. That federal courts should determine their own personal jurisdiction is a proposition fundamentally at odds with our government of separated powers. The Supreme Court typically has approved the creation of federal common law only when there is some basis for the conclusion that Congress would have adopted the rule fashioned by the courts if it had considered the matter, or at least that Congress would have left the choice to the courts. *See, e.g., United States v. Little Lake Misere Land Co.*, 1973, 412 U.S. 580; *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363; *see generally* M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 79-107 (1980); Friendly, *In Praise of* Erie—*And of the New Federal Com-*

ment Law, 39 N.Y.U.L. Rev. 383 (1964). We find no basis for either conclusion in this case.

B.

[10] The 1974 amendments to the CEA provide for actions (1) by the CFTC (formerly the Commodities Exchange Commission), (2) by state attorneys general, and (3) by private parties seeking to enforce a CFTC ruling in their favor. 7 U.S.C. §§ 13a1, 13a2, 18(d). To make these actions effective, the sections referred to expressly provide for nationwide service of process. In 1982 Congress provided for private actions under the CEA, 7 U.S.C. § 25, but was silent as to service of process. Point Landing argues that Congress intended to allow nationwide service of process in private actions because it did so in the other types of actions authorized under the CEA. There is no basis for this argument. On the contrary, the clear language of §§ 13a1, 13a2 and 18(d) demonstrates that Congress knows how to provide for nationwide service of process. The more likely inference to draw from the congressional silence is that Congress omitted that language from § 25 because it did not intend to permit nationwide service of process. Even though private actions are a "significant enforcement tool", *Curran*, 356 U.S. at 393, there is a rational governmental basis for limiting service of process in private suits while giving wide powers to those government regulatory bodies charged with primary responsibility for developing and enforcing regulatory policy. Indeed, a House Committee reported that it looks to vigorous enforcement by the CFTC, "so it does not become necessary to rely on private litigants as a policeman of the Commodities Exchange Act". H.R. Rep. No. 97-565(I) at 57.

Since the CEA is silent on the subject of process, authority for service and personal jurisdiction must be found in the Rules.

C.

Professor Moore comments on the general rules provision governing service of process and personal jurisdiction:

> No court has unlimited authority to issue original process. In regard to state courts, the basic limitation on service of original process is the notion that a state may only exercise

> jurisdiction over a res that is within its borders or over a person who has been personally served within the state, or who has had sufficient contact with the state so that in personam service may be made beyond its borders consistent with due process.
>
> Similarly, the federal district courts may only issue process for service within the territorial limits validly authorized by a federal statute or the Federal Rules.

2 J. Moore, J. Lucas, H. Fink, & C. Thompson, Moore's Federal Practice ¶ 4.02[3] at 4-45-46 (footnotes omitted).

"Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained". *Insurance Corp. of Ireland*, 456 U.S. at 715 n.6 (Powell, J., concurring). Rule 4 therefore has been characterized as a "jurisdictional provision". 1963, 374 U.S. 869 (statement of Black and Douglas, JJ., dissenting from adoption of amendments to the Federal Rules of Civil Procedure).

Rule 4(f) provides in part:

> (f) *Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.

Rule 4(e) provides:

> (e) *Summons: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner

> stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made *under the circumstances and in the manner* prescribed in the statute or rule. (emphasis added)

Rule 4(e) therefore permits service "under the circumstances . . . prescribed" by a statute or rule of the state in which the district court sits. (No question is raised here by the parties as to the "manner" of service.) The critical phrase "under the circumstances" was added to the rule in 1963. This occurred several years after our decision in Lone Star Package Car Co. v. Baltimore and Ohio Railroad, 5 Cir. 1954, 212 F.2d 147.

In *Lone Star* this Court made the broad statement that whether the state long-arm statute asserts jurisdiction over a defendant sought to be joined in suit is irrelevant "where the power of the federal court . . . can be independently sustained . . . on the ground that the matter in controversy arises under the Constitution, laws or treaties of the United States". 212 F.2d at 153-54. *See also Terry v. Raymond International, Inc.*, 5 Cir. 1981, 658 F.2d 398, 401, *cert. denied*, 1982, 456 U.S. 928, in which this Court declared that in a federal question case the "contours of amenability . . . are more fluid".[9]

In *Lapeyrouse v. Texaco, Inc.*, 5 Cir. 1982, 693 F.2d 581, Judge Williams, for the Court, citing *Lone Star* and *Terry*, found that the "sole test for amenability" to personal jurisdiction in a federal question case is the due process clause of the Fifth Amendment.[10] The opinion states:

[9]Both these statements are relied on in *Lapeyrouse v. Texaco, Inc.*, 5 Cir. 1982, 693 F.2d 581, 585.

[10]On the Fifth Amendment-Fourteenth Amendment due process point, see Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. Rev. 1 (1984).

> [T]he Supreme Court's consideration of various factors as relevant to a determination of the fairness of exerting jurisdiction take on new meaning in the context of a federal forum interpreting its own laws. Thus, while we are aided by the constructions provided the due process clause under the Fourteenth Amendment in determining whether *in personam* jurisdiction may be asserted, we must give weight to the differences occasioned by the federal nature of both the forum and claim in determining whether the due process clause of the Fifth Amendment permits exercise *in personam* jurisdiction in this case.

693 F.2d at 586 (footnote omitted).

In Burstein v. State Bar of California, 5 Cir. 1982, 693 F.2d 511, in a thorough and perceptive analysis of Rule 4(e), Judge Randall, for the Court, concluded:

> While by its terms rule 4(d) might well apply to this case, it is clear that rule 4(e) is designed for use to obtain service on parties not resident within the forum state, and by negative implication it excludes rule 4(d). . . .
>
> . . . .
>
> . . . The clear import of the "under the circumstances" language, at least where the assertion of jurisdiction and not just the service of process depends on the state statute, is that a federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state court also reach under it.

693 F.2d at 514 (citations omitted).

The opinion quotes Professors Wright and Miller:

> On balance, then, it would seem that state law always should govern amenability when a state statute is used pursuant to Rule 4(e). Although the opposite result has

> some appeal in that it permits effectuation of federal interests in a broader range of suits, it is inconsistent with the apparent intent of the draftsmen of Rule 4(e) to use state provisions for service in order to permit the federal courts in a state to hear those cases that could be brought in the state's own courts when a basis for asserting federal subject matter jurisdiction exists.[11]

4 C. Wright & A. Miller, *Federal Practice & Procedure*, § 1075 at 313 (1969).

Judge Randall took pains to point out that *Lone Star* involved a diversity claim and in-state service. It therefore comes within Rule 4(d)(7) rather than Rule 4(e). Rule 4(d)(7) requires service only "in the manner prescribed by the law of the state in which the district court is held"; it does not have the "under the circumstances" language of Rule 4(e).

In *DeMelo v. Toche Marine, Inc.*, 5 Cir. 1983, 711 F.2d 1260 the Court was confronted with the dilemma of choosing between *Burstein* or *Lapeyrouse*. Judge Gee, for the Court, "look[ed] to the Rule" and decided that the *Burstein* "exposition . . . is the more sound". 711 F.2d at 1266. "*Lone Star* was decided in 1954, long before the 1963 amendments to Rule 4 added the second sentence to Rule 4(e). . . . *Terry* discussed neither the 1963 amendments to Rule 4 nor any of the intervening federal question cases that had applied a state standard of amenability". . . . [R]elying solely upon the broad language in *Lone Star*, *Terry* applied a federal standard, treating the reach of the state long-arm statute as 'irrelevant' ". 711 F.2d at 1268-69.

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[11]Judge Randall added this footnote:

> The other leading commentator in the field takes the opposite position. J. Moore, J. Lucas, H. Fink, & C. Thompson, *Moore's Federal Practice* ¶ 4.41-1[1] at 4-424 (1982). Since the entire discussion of amenability under rule 4(e) consists of a reference to the discussion of amenability under rule 4(d), *id.* ¶ 4.24[7], with no explanation for the similarity in analysis and result despite the difference in language between the two rules, we find Wright & Miller more persuasive.

693 F.2d 511, 515, n.5

Most courts agree that Rule 4(e) incorporates the forum state's long-arm statute when the federal statue sued under does not authorize nationwide service of process. In Max Daetwyler Corp. v. R. Meyer, 3 Cir. 1985, 762 F.2d 290, *cert. denied*, 106 S.Ct. 383, the court recently addressed the issue before this Court: amenability to jurisdiction of an alien defendant in a federal question action when the defendant's contacts with the United States as a whole were sufficient to satisfy due process, but contacts with the forum state were insufficient. The court, per Garth, J., held that "in the absence of a governing federal statute providing for nationwide service of process, in personam jurisdiction may not rest upon an alien's aggregated national contacts," and the long-arm statute of the forum state must be applied. *Id.* at 291. The court declined the plaintiff's suggestion that it adopt a "national contacts theory," which asserts that "the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States." *Id.* at 293. The court noted that, although the national contacts theory might be constitutionally valid, Rule 4(e) was a limitation on the court's power. It interpreted Rule 4(e) as adopting "an incorporative approach requiring that both the assertion of [personal] jurisdiction and the service of process be gauged by state amenability standards." *Id.* at 295.

The court implied that if the national contacts theory is accepted, it in effect reads a nationwide service of process provision into all federal laws when an alien is a defendant. It recognized that although "the uniform administration of federal law might be enhanced were Congress to establish a general federal question competence statute, in the absence of such legislation, we are required to follow the incorporative provisions of Rule 4(e)". *Id.* at 296. The court stated that all but a "few" courts interpreted Rule 4(e) the same way. *Id.* at 297.

The court in *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty., Ltd.*, D.C. Cir. 1981, 647 F.2d 200, concluded, in a trademark case, that in the absence of a federal statute authorizing nationwide service of process, under Rule 4(e) "we must look to the District of Columbia long-arm statute". *Id.* at 204. *Wells Fargo & Co. v. Wells Fargo Express*, 9 Cir. 1977, 556 F.2d 406, 418, rejected the national contacts theory because the Lanham Act did

not grant federal courts broad service of process powers. *See also Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 1 Cir. 1984, 743 F.2d 947, 950 (Federal Rules of Civil Procedure and other congressional mandates limit exercise of personal jurisdiction in federal question cases).

The Court of Appeals for the Sixth Circuit has concluded that "a federal district court considering a case that arises under federal law is not subject to precisely the same due process limitations which restrict its reach in diversity cases". *Handley v. Indiana & Michigan Electric Co.*, 6 Cir. 1984, 732 F.2d 1265, 1272. The *Handley* court invoked the Kentucky long-arm statute, but nevertheless asserted jurisdiction over a defendant not subject to the jurisdiction of the Kentucky courts. The court reasoned that, since the Kentucky statute extends jurisdiction to the limit of the Fourteenth Amendment, federal courts in federal question cases may extend jurisdiction to the limits of the Fifth Amendment. We find no warrant in the language or history of Rule 4(e) for this result.

[11] In short, an "overwhelming majority of federal courts have held that, in the absence of specific provisions to the contrary, rule 4 adopts the state provisions on amenability to service and on manner of service". Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv. L. Rev. 470, 471 n.6 (1981). Probably a majority of commentators agree that Rule 4(e) incorporates the forum state long-arm statute when the federal statute sued under does not provide for a nationwide service of process even though they may disagree with that conclusion as a matter of policy. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 Va. L. Rev. 85 (1983); Von Mehren & Troutman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1123 n.6 (1966); Note, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 Cal. L. Rev. 686, 690 n.24, 693 (1982) Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv. L. Rev. 470, 479-81 (1981); *see generally* Project, *Obtaining Personal Jurisdiction Over Alien Corporations—A Survey of U.S. Practice*, 9 Vand. J. Transnat'l L. 345 (1976).

[12] There may be some appealing arguments for the notion of aggregating national contacts in federal cases where in any one

forum there are not enough local contacts to justify use of a state long-arm statute for service of process and for personal jurisdiction to attach, although the aggregate of the national contacts are substantial. But we cannot blink the language of Rule 4(e). We cannot read the rule except as saying that absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits. *Lapeyrouse* and *Terry* are overruled to the extent that they differ from the views expressed in this opinion.

Neither Point Landing nor Omni disputes the court's findings that Wolff and Gourlay are not subject to the jurisdiction of the Louisiana courts under that state's long-arm statute.

The judgment of the district court is AFFIRMED. The case is remanded for further proceedings consistent with this opinion.

Wisdom, J., with whom Chief Judge Clark, and Judges Rubin, Politz, Johnson, and Williams join, concurring in part and dissenting in part:

I respectfully dissent from Section III of the majority opinion. That section is an exercise in lawyering, not in judging. By focusing attention on the details of service of process, the majority lose sight of important questions of jurisdiction. In this federal question case, the effect of the majority's decision is to grant jurisdictional immunity to alien defendents who have done business in this country thereby destroying any real possibility of holding them accountable for their violation of federal statutes.[1] This immunity is granted in spite of the defendants' apparently extensive contacts throughout the country, because the defendant's contacts in Louisiana where the suit was filed, are so minimal that the state's long-arm statute

[1] In this opinion the term "alien", when applied to a corporation, refers to a corporation organized under the laws of a foreign country. The term "foreign", when applied to a corporation, refers to a corporation organized under the laws of a state other than the state of its forum.

Wolff is a corporation organized under the laws of Great Britain with its offices in London. Gourlay is a British citizen with his office in Wolff's suite of offices. Neither has an office in the United States.

cannot be used for service of process, under traditional *International Shoe*[2] principles.

I can understand that in a diversity case a federal court should be restricted in the use of a state long-arm statute to situations in which a defendant's state contacts are sufficient to meet the requirements of fairness under the due process clause of the fourteenth amendment. I cannot understand the rationale for imposing state legislative and territorial restraints on federal courts in a federal question case involving a national policy, such as that embodied in the Commodities Exchange Act, calling for national uniformity in enforcement.[3] The majority's conclusion does violence to the structure of the American polity. A federal court's service arm in a federal question case should not be handcuffed to the place of the court's seat.

Statutes and rules should be construed so as *not* to reach an irrational result. Here there is a bizarre hiatus in the Rules. There is no national long-arm service of process provision in the Commodities Exchange Act. And Rule 4 does not appear to provide for service of process on and personal jurisdiction over an alien corporation which may have numerous contacts with the nation but few contacts with either the forum state or with any other particular state. When there is a hiatus in the Federal Rules the district court may establish its own ad hoc rule, provided that it is fair and reasonable and not inconsistent with any of the express rules. In a federal question action, aggregating a defendant's national contacts is analogous to aggregating state contacts in a diversity case. Aggregation of national contacts is a fair and reasonable ad hoc solution to the problem. The basis for amenability to suit is the relationship between the defendant and the forum. In a diversity action in

[2] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[3] Justices Black and Douglas opposed the submission of the Rules of Civil Procedure to Congress and their approval by the United States Supreme Court. They had little or no objection to "simple housekeeping details", but they objected strongly to rules which "substantially affected litigants and in practical effect were equivalent of new legislation". Statement by Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865 (1963). The justices "could see no reason why the extent of a Federal District Court's personal jurisdiction should depend on the existance or nonexistence of a state's 'long-arm statute' ". *Id.* at 869.

which a federal court sits as a state court, there is good reason to be guided by *International Shoe*. No such reason exists when the federal court sits as an integral part of our national system of courts responsive to federal law and federal objectives.

I.

I start with Rule 1 of the Federal Rules of Civil Procedure:

> These rules "... shall be construed to secure the just, speedy, and inexpensive determination of every action ..."

Here, the defendants' Louisiana connections are so tenuous as to be insubstantial for purposes of complying with the minimum contacts rule, as established in *International Shoe* and its progeny, and apparently the defendants' contacts are insubstantial with respect to any particular state, even New York. In the aggregate, however, the defendents' contacts with the country as a whole are substantial. The defendants do not suggest that they have substantial contacts elsewhere in the United States or that this forum is less convenient to them than some other forum in this country. The district court found the defendants subject to its jurisdiction,[4] until the defendants called the *DeMelo*[5] case to its attention.

The majority's construction of Rule 4 brings about the unjust, inconvenient, and expensive result of immunizing Wolff and Gourlay from liability, except for suit by the plaintiffs in Great Britain, and there is no likelihood that a British court would find liability for the violation of, or even understand, the technical federal statute here involved. I believe that there is an alternative construction of the Rules in keeping with the objectives of Rule 1, and that suit in a United States forum will give both sides fair consideration of the substantive issue.

[4] In order dated May 13, 1983.

[5] *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1982).

II.

Rules of procedure are just that, rules of procedure. They are not substantive. They are for efficient housekeeping. To assure that the rules would be limited to procedure, Congress provided that they must not "abridge, enlarge or modify any substantive right". 28 U.S.C. § 2072. Rule 4 provides the mechanics for service of process. It has no necessary relation with a court's *acquiring* personal jurisdiction.

Indeed Rule 82 provides in part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

In short, if there is personal jurisdiction, Rule 4 should not be construed as limiting the jurisdiction of the United States district courts. "With the adoption of the Federal Rules of Civil Procedure in 1938", Professor Marilyn J. Berger has written, "Congress finally attempted to provide a uniform standard for *exercising* personal jurisdiction in federal courts. Despite that attempt there is currently no uniform method for *acquiring* personal jurisdiction in federal question cases. A contributing factor to the lack of uniformity is Federal Rule of Civil Procedure 4. . . . Although the Rule describes the mechanism for service of process, it does not clarify the amenability basis [that is, the relationship between the defendant and the forum]".[6]

In short, if there is personal jurisdiction, Rule 4 should not be construed as limiting the jurisdiction of United States district courts.

III.

A. Rule 83 provides in part:

[6]Berger, Acquiring *In Personam* Jurisdiction in Federal Question Cases: Procedural Frustration under Federal Rule of Civil Procedure 4, 1982 Utah L. Rev. 285, 286.

> In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules.

In *Petrol Shipping Corp. v. Kingdom of Greece, Min. of Com.*,[7] the Second Circuit did not shrink from approving a method of service to fit a situation not contemplated by the rules. The defendant was the Greek Ministry of Trade, State Purchase Directorate, and service of process was effected by ordinary mail addressed to that agency. The court concluded that the defendant was merely an agency of the Greek government. Acknowledging that "[n]either Rule 4(d)(3), nor any other part of Rule 4, provides for service on such a party",[8] the Court did not bow out of the case. Instead it fashioned a rule not inconsistent with Rule 4:

> But the fact that Rule 4 does not provide a method for service on respondent does not mean that no service could be effective. Rule 83 permits "each district court, by action of a majority of the judges thereof" to "make and amend rules governing its practice not inconsistent with these rules." The Rule goes on to say, "in all cases not provided for by rule, the district court may regulate their practice in any manner not inconsistent with these rules." See also 28 U.S.C. § 2071.
>
> And when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules. Rule 83, supra; *see In re United Corp.*, 283 F.2d 593 (3 Cir. 1960). *There is no compelling reason why the court must fashion the rule in advance*, although the better practice in a case such as this might be to secure an advance ruling, approving a given method of service. (Emphasis added.)[9]

In re United Corp.,[10] cited in the *Petrol Shipping* opinion, arose in a different context, but it shows the lattitude extended to a district

[7]360 F.2d 103 (2nd Cir. 1963).

[8]360 F.2d at 107.

[9]360 F.2d at 108.

[10]283 F.2d 593 (3d Cir. 1960).

court in fashioning its own rule. The district court denied attorneys the right to file objections to allowance of fees and expenses for services rendered in the reorganization of a corporation, when the attorneys appeared and requested leave to file objections on the day of the hearing on that subject, fifteen days after the deadline fixed by the court for filing objections. No rule covered the situation. The Court of Appeals for the Third Circuit approved the district court's order:

> A United States District Court, in all cases not provided for by the Federal Rules of Civil Procedure, 28 U.S.C., or by its local rules, may regulate the practice to be followed in proceedings properly before it in any manner not inconsistent with the Federal Rules of Civil Procedure or statute. See Rule 83, Fed.Rules of Civ. Proc. and Section 2071, Title 28 U.S.C. The manner and enforcement of such regulations rests in the court's sound discretion and will not be interfered with by an appellate tribunal in the absence of a showing of arbitrariness or fundamental unfairness.

283 F.2d at 596.

There is no federal rule and no local rule governing service of process on alien defendants or personal jurisdiction over alien defendants. The language of Rule 4(e) does not contain any suggestion that it provides the exclusive method for obtaining service and personal jurisdiction over an alien defendant. Indeed the first sentence of Rule (e) provides:

> Whenever a statute of the United States or an order of the court thereunder provides for service of a summons, or notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, *in a manner stated in this rule.* (Emphasis added.)

The permissive words "may be made" suggest that other methods are permissible. The unqualified words "in a manner stated in this

rule" suggest that the method of service should be analogous to service under a state long-arm statute. The analogy here is between state and nation, between state contacts and national contacts, between the due process clause of the fourteenth amendment and the due process clause of the fifth amendment. Rule 4(e) should be read as silent on the point at issue or, at most, permitting a non-exclusive form of service on an alien or foreign defendant, when there are sufficient state contacts to justify use of the state long-arm statute.

Rules 82 and 83, considered with Rule 1, point to courts' *not* taking a scrivener's arid reading of the Federal Rules. The rules were adopted in 1938 to get away from rigid common law procedures. The growth of multinational corporations engaging in international commercial activities strongly argues for a flexible view of the personal jurisdiction of national courts when the defendant is an alien. The due process protection of the Fifth Amendment and the liberal transfer provision of the Rules will ensure an alien defendant a fair trial.

B. I summarize to this point. Rule 4 describes the mechanism for service of process. It says nothing about jurisdiction, because regardless of service, there must first be jurisdiction. But there is no reason for federal courts to be bound by a state test of jurisdiction. The state test is based on the due process clause of the fourteenth amendment: fairness demands that the defendant have substantial contacts with the state, as established in *International Shoe* and other decisions of the Supreme Court. *International Shoe*, as everyone knows, concerned the reach of a state law in a state court action. But the appropriate test for a federal question case is a federal test: Are the contacts with the country as a whole substantial enough to satisfy the due process clause of the Fifth Amendment?

No one denies that the district court had subject-matter jurisdiction, for the defendants allegedly violated a federal statute enbodying what was intended to be a uniform national policy on commodities exchanges. The defendants advertised in the Wall Street Journal, conducted a number of investor meetings in various states, and had many contacts with the country as a whole. No one pretends that in a civil suit in Great Britain the courts would look kindly on enforcement of the United States securities laws. It

passes belief that Congress intended to provided aliens a sanctuary from liability because of a housekeeping rule for federal courts that was obviously not written with alien defendants in mind.

IV.

In *International Shoe* the Supreme Court held that the "Fourteenth Amendment requires that the defendant's operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just . . . to permit the state to enforce the obligations which [the defendant] has incurred there". 326 U.S. at 320. As a result, "the overwhelming concensus among federal courts is to analyze questions of *in personam* jurisdiction over alien defendants by examining the relationship of the defendant, the litigation and the forum under traditional *International Shoe* principles." *Superior Coal Co. v. Ruhrkohle A.G.* [11] This fits nicely in a diversity case and allows for variations caused by diverse state statutes, whether the statute is narrow or broad. But it is not designed for federal question cases involving a congressional law that should be uniformly enforced.[12] In such cases a defendant could never be brought to trial or a trial could be held in an inappropriate location, because the defendant lacks the requisite contacts with the state in which the suit is filed.[13] The result is the

[11]83 F.R.D. 414, 419 (E.D. Pa. 1979).

[12]"The necessary use of differing state long-arm statutes, and the determination of minimum contacts with a particular state means that the effective benefit and production of many federally created rights can be limited by the law of the state in which the district court sits." Recent Decision, 9 Vand. J. Transnat'l L. 435, 444 (1976).

[13]In *DeJames v. Magnificence Carriers, Inc.* 654 F.2d 280 (3d Cir. 1981) the Court affirmed a district order dismissing an admiralty claim against a Japanese corporation which did conversion work on American ships in Japan. Service was obtained under New Jersey long-arm statute. The Court of Appeals found that the defendants's contacts with New Jersey were insufficient to support personal jurisdiction.

In a strong and persuasive dissent, Judge John J. Gibbons argued:

> When a court asserts personal jurisdiction over a foreign defendant on the basis of a state law claim, it must ensure that the forum state does not unduly encroach on a sister state's interests. When a court, state or federal, adjudicates a federal claim, the federalism issue is of no relevance, for the court determines the parties' rights and liabilities under uniform national law. No state intrudes on another's interests. The only relevant interest is the national one. Thus the applicable constitutional due process provision should not be the fourteenth amendment, but the fifth amendment.
>
> *See Stabilisierungsfonds fur Wein et al. v. Kaiserstuhl Wine Distributors Pty. Ltd. et al.*, 647 F.2d 200 (D.C.Cir. 1981), at 203 & n.4 . . . A defendant's national contacts enter into the fifth amendment fairness analysis, for it would be unreasonable to subject to suit in the United States a foreign national defendant who had but one fleeting connection with this country. But it is not necessary, under the fifth amendment due process clause, that the defendant's contacts relate primarily to the particular United States location in which the claim arose. Thus, for example, it would not be unfair under the fifth amendment to subject a foreign national shipper to suit in New Jersey . . . . The availability of witnesses points to the District of New Jersey as the most convenient forum for the litigation.

654 F.2d at 292.

[14]Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdiction Standard, 95 Harv. L. Rev. 470, 471 (1981).

[15]Von Mehren v. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1125 n.6 (1966).

[16]397 F.Supp. 287 (D. Conn. 1975).

subjugation of the federal interest in enforcement of federal laws to state considerations that should be irrelevant".[14] Federal courts should "disregard" state law "provisions that are irrelevant in the federal context".[15]

Federal courts are common law courts. The genius of the common law has been its capacity for innovation and growth, its ability to fill those interstices in the law inadvertently left by legislative enactment. Nothing in the Rules suggests that the Supreme Court in adopting them intended to foreclose any other method of service that would satisfy the requirements of due process. The majority uses a gap in the procedural rules to work an injustice in the substantive result, failing to exercise the judicial power imparted to us by Article III of the Constitution and the court's common law power implicitly confirmed by the seventh amendment.

In *Cryomedics, Inc. v. Spembly, Ltd.*,[16] the District Judge Jon Newman, who is now on the Court of Appeals for the Second Cir-

cuit specifically considered the issue before this court without referring to Rule 4(e). Cryomedics, a Connecticut corporation, brought an action in federal court against an alien corporation for a patent infringement. The alien corporation, Spembly, Ltd., filed a motion to dismiss based upon lack of personal jurisdiciton. Judge Newman held:

> [I]t is not necessary to decide whether Spembly's contacts with Connecticut are alone sufficient to satisfy the demands of the constitution. When a federal court is asked to exercise personal jurisdiction over an alien defendant sued on a claim arising out of federal law, jurisdiction may appropriately be determined on the basis of the alien's aggregated contacts with the United States as a whole, regardless of whether the contacts with the state in which the district court sits would be sufficient if considered alone . . . . If the defendant's contacts with the United States are sufficient to satisfy the fairness standard of the Fifth Amendment . . . then the only limitation on place of trial would be the doctrine of forum non conveniens.

397 F.Supp. at 290. The court in *Cryomedics, Inc.* continued:

> The few courts that have explicitly considered the appropriate unit of government with which there must be contacts have all agreed that the aggregation of an alien defendant's contacts with the United States is the proper procedure in a case arising under federal law. . . .
>
> It is difficult to see how *International Shoe* and its progeny, which dealt with the limits on the jurisdiction of state courts, and on which Spembly bases its arguments, could be read to limit the jurisdiction of a federal court on a federally created cause of action. . . .

397 F.Supp. at 291.

Significantly, in *Cryomedics* the defendant did not challenge the validity of the service. Here too the defendants have not challenged the validity of the service. Even if they have not waived their right to challenge service of process, the issue is: were there sufficient

contacts for the court to have personal jurisdiction? On that issue there is no challenge and there can be no question. Failure to challenge service opens the door to inquiry into the sufficiency of the contracts between the defendant and the governmental entity of which the court was a part. Here that entity was the United States and the fairness standard was the due process clause of the fifth amendment, not of the fourteenth amendment. The territorial limits therefore were the boundaries of the United States, not the state in which the court happened to sit, and the determination of the sufficiency of the contacts to support personal jurisdiction turned on contacts with the nation, not those with the state.

Cryomedics, characterized as the leading case accepting the aggregate contacts test, did not blast off without authority.[17] Judge Newman pointed to *Edward J. Moriarty & Co. v. General Tire & Rubber Co.,*[18] in which the court in an antitrust action against a Greek defendant considered the defendant's ties to the state in which it sat, yet, "argued convincingly that it is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of government of which the court is a part. . . [especially] 'where national uniformity in enforcing [federal] right should be the true guideline' ".

The Cryomedics court also cited *Holt v. Klosters Rederi A/S,*[19] a suit under the Death on the High Seas Act, in which the court upheld jurisdiction on the basis of a contract exclusively outside the forum state; quoted from *Engineered Sports Products v. Brunswick Corp.,*[20] a patent infringement action, holding that "[D]ue process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States because each state makes up only a fraction of the substantial

[17] But see Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Standard, 95 Harv. L. Rev. 470, 481 (1981).

[18] 289 F.Supp. 38 (S.D. Ohio 1967).

[19] 355 F.Supp. 354 (W.D. Mich. 1973). In *Holt,* as in *Cryomedics,* the defendant failed to challenge the validity of the service. *Cf. Engineering Equipment Co. v. S.S. Selene,* 446 F.Supp. 706, 709-10 (S.D.N.Y. 1978) in which the court aggregated the national contacts of an alien defendant to determine whether quasi in rem jurisdiction could be exercised.

[20] 362 F.Supp. 722 (D. Utah, 1973).

nationwide market for the offending product" (362 F.Supp. at 728); and concluded that an alien "which transacts business in the United States only through other countries and which maintains a place of business only in the country of its incorporation . . . has no reason based on fairness to prefer any one particular district to any other" (397 F.Supp. at 292).

In 1961 Professor Thomas F. Green, Jr. formulated the aggregate contacts test.[21] Shortly after, in *First Flight Co. v. National Carloading Corp.*,[22] the court adopted the test in an action against a foreign corporation for damage to cargo. Service was effected under Rule 4(d)(3), but the court clearly expanded the scope of its minimal contact inquiry to the national forum. The court noted that Professor Green had suggested that "state jurisdiction under the Fourteenth Amendment is ... suitable for analogical application to federal jurisdiction under the Fifth Amendment ... The Supreme Court has left no doubt but that the material constitutionality inquiry in this regard concerns not contacts with the physical territory of the court, but rather contacts with the sovereignty of which the court is an arm. And the sovereignty of which a federal court is an arm is, of course, the United States". 208 F.Supp. at 738.

Centronic Data Computer Corp. v. Mannesnam, A.G.,[23] was an antitrust action against a German corporation. The court found that it had jurisdiction; otherwise "aliens could commit serious torts or contract breaches without ever having enough contacts with any one forum to give those injured an opportunity to seek rederess". 432 F.Supp. at 664.

Although it must be admitted that the weight of authority, both in the cases and in the commentary, rejects the aggregate contacts doctrines, I am not persuaded by authority that leads to an irrational and unnecessary result. Judging requires something more than counting how many cases are *pro* and how many are *con*. In a federal question case with respect to a matter as important as personal

[21]Green, Federal Jurisdiction in Personam of Corporations and Due Process, 14 Vand. L. Rev. 967 (1961).

[22]209 F.Supp. 730 (E.D. Tenn. 1962). The claim was under 49 U.S.C. § 20(11)-(12) (1976).

[23]432 F.Supp. 659 (D.H.H. 1977).

jurisdiction over alien and foreign defendants, I would construe the rules to achieve the objectives of Rule 1. By analogy to *International Shoe* and its progeny, personal jurisdiction is found in the relationship of the defendants to the nation and the aggregate of their contacts with the nation as a whole. The due process clause of the fifth amendment is at least as effective as the corresponding clause in the fourteenth amendment in assuring fairness to the alien defendant.

V.

Burstein and *DeMelo* present a superficially attractive, heuristic way out of a bad situation--into a worse situation. It is something like using a sword on the Gordian knot and finding the edge so blunt that it simply mangles half the knot, leaving that part still entangled.

I would hold that the district court was right the first time in holding:

> Since the Congressional statutes support the exercise of personal jurisdiction to the extent of due process, we would need to look to Louisiana state statutes (such as "long-arm"), if at all, for methods of service of process only. No service of process issue is raised.

In a claim based upon a federal securities or commodities statute, whether the quality and nature of a foreign defendant's activities support a fair play and substantial justice determination, *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), involves a consideration of all of defendant's activities in the United States, not just in the forum state. *See Leasco, supra*, and *Mariash v. Morrill*, 496 F.2d 1138 (2nd Cir. 1974).

Factors to be considered are whether the defendant was doing business in the United States, whether the defendant did an act in this country related to the claim, and whether the defendant caused an effect in the United States by an act done elsewhere.

This is a reasonable ad hoc ruling on a hiatus in the Rules. It is not inconsistent with Rule 4(e) and is highly consistent with Rules 1, 82, and 83, and with the objective of the Commodities Exchange Act. It is consistent with the role federal courts are designed to play in the American polity.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

POINT LANDING, INC. and POINT LANDING FUEL CORP.	CIVIL ACTION NO. 80-677 consolidated with NOS. 81-590, 81-1996 and 81-4695
VS.	
OMNI CAPITAL, ET AL	

ORDER AND REASONS: MOTIONS TO DISMISS

These four consolidated cases all involve claims for damages based upon similar factual allegations and identical legal theories and seek similar relief. Each plaintiff allegedly invested in a "silver straddle" because of material representations allegedly made by agents of certain defendants at various meetings held in New Orleans in 1975 and 1976. The investment program involved the use of discretionary trading accounts to purchase and sell options

and contracts in silver commodity futures traded on the London Metals Exchange, through brokers in London.

As a result of representations allegedly made to plaintiffs by certain defendants, favorable tax treatment was claimed on plaintiffs' federal income tax returns for several years. Subsequently, the Internal Revenue Service notified the plaintiffs that losses arising out of the silver straddle investment program would not be allowed.

Jurisdiction in each of the four cases is based upon alleged violations of:

(a) Sections 10b and 20 of the Securities Exchange Act of 1934 (15 USC 78j and 78t);

(b) S.E.C. Rule 10b-5 (17 C.F.R. 240.10b-5);

(c) Section 17(a) of the 1933 Securities Exchange Act (15 USC 77q(a));

(d) Section 4(b) of the Commodities Exchange Act (7 USC 6b and 17 C.F.R. 1.01 et seq);

(e) Section 9b of the Commodities Exchange Act (7 USC 13b);

(f) State law (pendent jurisdiction)

None of the four "sets" of plaintiffs has any relationship with the others. In the suits by plaintiffs Mr. and Mrs. Smith, Mr. and Mrs. George and Mr. and Mrs. Rosenberg, defendants are three corporations: Omni Capital International Ltd., Omni Capital Corporation, and Northglen Capital Corporation. Individual defendants are W. Lewis Ryder, who allegedly acted on behalf of Omni Capital International and Northglen, and three Omni corporate officers: Friedberg, Stern and Minsky. Also a defendant is a brokerage firm,

Competex, S.A., now in liquidation, which allegedly performed the activities on the London Metals Exchange. In the fourth suit, by the two Point Landing corporations, defendants are the same, except that Ryder and Northglen are omitted and Rudolf Wolff and Co., a London brokerage firm, is substituted for Competex.

In the Smith, George, and Point Landing suits, the two Omni corporations filed third party complaints, as did Northglen in the Smith and George suits. In the Smith and George cases, the third party defendants are Wolff and Co., James Gourlay (who allegedly controlled Competex), and Main, Hurdman, an accounting firm. In the Point Landing suit, third party defendants are Gourlay, and Main, Hurdman. Also, the

Omni corporations cross-claimed against Wolff in the Point Landing suit, and the Omni corporations and Northglen cross-claimed against Competex in the Smith and George suits. In the Rosenberg suit, no incidental actions are pending.

For the following reasons, the court takes the action indicated hereafter with respect to the several motions which were submitted on a previous date and taken under advisement.

PERSONAL JURISDICTION

Motions seeking dismissal on the grounds of lack of personal jurisdiction were filed by Wolff Co., Gourlay, and Minsky.

When a party's allegations of in personam jurisdiction are challenged, the party asserting jurisdiction has the

burden of showing some basis for its assertion of jurisdiction. Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); 5 Wright and Miller, Federal Practice and Procedure §1351 at 565 (1969). In ruling upon these motions we consider depositions, affidavits and other written material submitted by the parties. See 5 Wright and Miller, Federal Practice and Procedure, Id.. Where the district court chooses to decide the issue of personal jurisdiction on written submissions rather than on the basis of an evidentiary hearing, the party asserting jurisdiction is required only to present a prima facie case for personal jurisdiction. Brown v. Flowers Industries, Inc., 688 F.2d 328 (5th Cir. 1982), Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981).

FOREIGN DEFENDANTS: WOLFF CO. AND GOURLAY

Neither of these defendants is a "citizen" or "resident" of the United States; Gourlay is a citizen and resident of Great Britain, Wolff is a United Kingdom corporation not qualified to do business in the United States.

Claims are asserted against both these defendants under the two Securities Acts and the Commodities Act. We conclude that, while none of the three statutes deals specifically with the issue, as to all three statutes Congress intended for U. S. courts to exercise personal jurisdiction over foreign defendants not present in the United States to the limits of the due process clause of the Fifth Amendment. All three statutes contain broad provisions with respect to venue and

service of process which support this conclusion. Securities Act: 15 U.S.C. 77v(a); Securities Exchange Act: 15 U.S.C. 78aa; Commodities Act: 7 U.S.C. 13a-1. As to the Securities Exchange Act, see Leasco Data Processing Equipment Corporation v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

Since the Congressional statutes support the exercise of personal jurisdiction to the extent of due process, we would need to look to Louisiana state statutes (such as "long-arm"), if at all, for methods of service of process only. No service of process issue is raised.

In a claim based upon a federal securities or commodities statute, whether the quality and nature of a foreign defendant's activities support a

fair play and substantial justice determination (International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945) involves a consideration of all of defendant's activities in the United States, not just in the forum state. See Leasco, supra, and Mariash v. Morrill, 496 F.2d 1138 (2nd cir. 1974).

Factors to be considered are whether the defendant was doing business in the United States, whether the defendant did an act in this country relating to the claim, and whether the defendant caused an effect in the United States by an act done elsewhere. See the Restatement (Second) of Conflict of Laws, Sections 27, 35, 36, 37, 45, 49 and 50.

GOURLAY

Gourlay is a citizen and resident of Great Britian. His participation in the silver straddle investment program consisted of discussions with representatives of Omni in an attempt to solicit business and, once that business was obtained, relaying business placed through Omni to Wolff, which executed the transactions. Gourlay had no personal contact with any of the plaintiffs in the main actions. He met with representatives of Omni in New York in the fall of 1974 to discuss commodities trading in general and a type of commodity transaction not involved herein. Additionally, there were several meetings in New York between Gourlay and representatives of Omni at which the concept of the silver

straddle investment program was discussed. Those meetings were apparently of a preliminary nature, because later Omni representatives traveled to London to conduct a "due diligence" investigation of Wolff and the silver straddle investment program. The details of the investment program were apparently finalized in London.

The few meetings which occurred in New York between Omni representatives and Gourlay did not, standing alone, constitute the type of activity which is of such "a quality and nature" that it is "fair and reasonable" to require Gourlay to defend this suit in the United States. These meetings were not regular or continuous; standing alone they do not constitute "doing business" (on Gourlay's part) in the United

States. See Bersch v. Drexel Firestone Incorporated, 519 F. 2d 974 (2d Cir. 1975).

The second basis on which jurisdiction could be exercised over Gourlay is if he had done an act in the United States which caused injury to the plaintiffs. Se the Restatement (Second) on Conflict of Laws, §36. The New York meetings cannot be construed as an "act in the United States causing injury to the plaintiffs." As stated above, the New York meetings were of a preliminary nature. Plaintiffs have not shown a substantial connection between the discussions at the New York meetings and the injuries to themselves. It is not asserted, nor is there any evidence that the alleged misrepresentation by Gourlay occurred during one of the New York

meetings. Without a showing of a substantial connection between the New York meetings and the alleged injuries, the relationship between them is too tenuous to conclude that the alleged injury arose as a result of the New York meetings.

We conclude, however, that the third basis for asserting jurisdiction, the "causes effects" approach of the Restatement (Second) of Conflict of Laws, Section 27, is a prima facie basis for in personam jurisdiction over Gourlay:

> §37 Causing Effects in State by Act Done Elsewhere
>
> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to

> the state make the exercise of such jurisdiction unreasonable.

In analyzing §37, the court in Leasco Data Processing Equipment, Inc., v. Maxwell, supra at 1341, stated that the principle contained in §37 "must be applied with caution particularly in an international context", and went on to suggest that in order to be sufficient to uphold jurisdiction, the effect within the state must occur "as a direct and foreseeable result of conduct outside the territory." Gourlay's actions in London met this test: they caused an effect in the United States which was a direct and foreseeable result thereof, and it is not unreasonable for this Court to exercise jurisdiction over the actor with respect thereto.

Gourlay was informed of the nature of the silver straddle transactions, the purposes thereof, and the Internal Revenue Service's requirements concerning the nature of the execution of the transactions. Gourlay placed the orders for the transactions with Wolff, and he knew that the transactions were to be executed on the London Metals Exchange, an exchange with which he was familiar. One basis for plaintiffs' claim is an allegation that Gourlay misrepresented the nature and operation of the London Metals Exchange. The nature and operation of the exchange was one reason given by the IRS for the disallowance of the anticipated tax benefits from the transactions. The "effect in the United States" was the disallowance of the tax benefits, and

that was a direct and foreseeable result of the manner in which the transactions were executed on the London Metals Exchange, due to the nature and operation of the exchange. Gourlay does not dispute the affidavit stating that he was aware of the purpose of the transactions. The documents establishes (sic) a prima facie case for personal jurisdiction.

WOLFF CO.

Rudolf Wolff and Company, Ltd., is a United Kingdom corporation with its principal place of business in London, England. Wolff is not qualified to do business in any state of the United States, nor does it maintain an office in the United States. Wolff has no employees, officers, telephone listing or registered agent in any state in this

country. It does, however, have a bank account in New York. It is true that Rudolf Wolff individually, apparently in his capacity as director for the company, holds membership in the New York Commodity Exchange, Inc., a U. S. based exchange. Even if this is considered as an activity of the corporate defendant, this without more does not constitute doing business on a regular basis. We have nothing to indicate that this membership had nothing to do with these transactions.

Wolff's participation in the silver straddle investment program, with respect to the Point Landing plaintiffs, was limited to executing purchases and sales of silver commodity options and futures transactions on the London Metals Exchange. After the completion

of the transactions, Wolff mailed confirmation slips of the transaction into the United States. Clearly the mailing of such confirmation slips into the United States is insufficient contact with this country to subject Wolff to suit in this country. The mailing of confirmation slips into this country cannot be seen as purposefully availing oneself of the benefits of the laws of the United States.

Neither would there be personal jurisdiction over Wolff based on its having directly caused an effect in the United States by an act done elsewhere, unless Wolff knew the nature and purpose of the silver straddle transactions as well as the Internal Revenue Service's requirements concerning the nature of the execution of the transaction.

Plaintiffs' only contention in this respect is that Gourlay acted as Wolff's agent; his knowledge and actions were therefore Wolff's.

We have already found in personam jurisdiction over Gourlay based upon "causes effects". Therefore, if an agency relationship existed between Gourlay and Wolff, Wolff would also be subject to jurisdiction.

Both Wolff and Gourlay deny that an agency relationship existed between them at the time relevant to these transactions. However, there are several facts which are facially indicative of at least an apparent authority situation. Gourlay corresponded repeatedly on Wolff stationary, his office was located inside the Wolff offices, and his

telephone service was routed through the Wolff switchboard. Additionally, Gourlay received his commission on the transactions from Wolff rather than directly from Omni.

The existence of apparent authority is generally determined based upon the acts of the principal rather than (those of) the alleged agent. Lanier v. Alenco, 459 F.2d 689 (5th Cir. 1972). Wolff knew or should have known of these regular activities by Gourlay, from which persons doing business with him would reasonably conclude that Gourlay was acting on behalf of Wolff. Thus based upon the documentary evidence before us at this time, there has been a prima facie showing of an apparent

agency relationship, permitting the exercise of in personam jurisdiction over Wolff based on the acts of Gourlay.

For the foregoing reasons, we deny at this time Gourlay's and Wolff's motions to dismiss on the basis of lack of personal jurisdiction, without prejudice to their right to reassert this defense based upon the evidence at trial.

MINSKY

Minsky is a New York citizen. With respect to his motion to dismiss for lack of personal jurisdiction, he concedes that the nationwide service of process provisions of the securities and commodities statutes, if applicable, subject him to suit in any state of the United States. Plaintiffs allege that Minsky is liable because he aided and

abetted all other defendants in the violation of the securities and the commodities statutes. Minsky asserts that because he is not an "aider and abettor" the court lacks jurisdiction over him. This is simply not a jurisdictional issue. If plaintiffs prove the facts upon which they base the claim that Minsky was an "aider and abettor", the court would clearly have jurisdiction over Minsky, based upon the activities in Louisiana of the agents/employees of the Omni corporations. If plaintiffs do not carry this burden of proof, a judgment on the merits in favor of Minsky will be the result. The court has jurisdiction to resolve the issues relating to Minsky's alleged liability; this motion is denied.

MOTIONS TO DISMISS: WOLFF AND CO., and GOURLAY

Wolff moves to dismiss (for failure to state a claim) the complaint of the two Point Landing corporations, the cross claims of the two Omni corporations in C.A. 80-677, and the third party complaints of the Omni corporations and Northglen Capital Corporation in C.A. 81-590 and C.A. 81-1996. Gourlay moves to dismiss for the same reasons the third party complaints against him by the two Omni corporations in Civil Actions No. 80-677, 81-590 and 81-1996.

The claims sought to be dismissed are brought under Sections 10b and 20 of the Securities Exchange Act of 1934, S.E.C. Rule 10b-5, and Section 17(a) of the 1933 Securities Act. Mover contends

that there is no implied right of private action under Section 17(a) and that the transactions involved are commodities transactions not subject to the securities laws. The plaintiffs oppose part of the motion, contending that the transactions are properly classified as "securities" under the securities law; therefore, claims can be stated under Sections 10b and 20 and Rule 10b-5.

Plaintiffs initially opposed the dismissal of the Section 17(a) claim. However, at a prior hearing this opposition was abandoned, the Fifth Circuit having recently held that there is no implied private right of action under Section 17(a). Landry v. All American Assurance Company, 688 F.2d 381 (5th Cir. 1982). Thus, the motion is

granted insofar as it seeks dismissal of the claims brought under Section 17(a), the only claims under the 1933 Securities Act.

With respect to the claims under Sections 10b and 20 and Rule 10b-5, the parties concede that the transactions involved were commodity futures transactions. For purposes of this analysis, we assume arguendo that the transactions were also securities transactions. To determine whether claims are stated under Section 10b and Rule 10b-5, we examine the relationship between the laws regulating commodities transactions and those governing securities transactions.

The Commodities Exchange Act (7 USC 1 et seq) was amended in 1974 to provide for the establishment of the Commodities

Futures Trading Commission and to vest the Commission with exclusive jurisdiction over "accounts, agreements ... and transactions" involving commodities future markets. 7 USC 2 (1974) The issue is what if any claims under the two securities acts survive the enactment of the Commodities Act. Claims under the securities acts may be based entirely upon statute or upon regulations enacted pursuant to one of the securities statutes. Only the latter are involved in the instant action.

Blessed with no controlling precedent in this circuit, we adopt the reasoning of the decisions holding that, as to commodities which are also securities, the commodities act preempts the securities act with respect to

regulations promulgated pursuant to the securities acts. Therefore, there can be no claim based upon such regulations. See American grain association v. Canfield, Burch & Mancuso, 530 F. Supp. 1339, 1346 (W.D. La. 1982) and cases cited therein.

Thus the commodities act is the only statute that provides a cause of action based upon a regulation when commodity futures are involved. The commodities act is not the exclusive statute if there is a statutory (as distinguished from regulatory) cause of action under either of the two securities statutes.

Plaintiffs' claim under the Securities Exchange Act is based in part upon an alleged violation of 15 USC 78j, which prescribes only specific activity "in contravention of such rules and

regulations as the [Securities Exchange] Commission may prescribe...". Since the Commodities Act preempted regulations under the Securities Exchange Act as to securities which are commodity futures, there can be no claim in this case under Sec. 10(b). Therefore, Wolff's and Gourlay's motions are granted insofar as they seek dismissal of claims arising under Section 10b and Rule 10b-5.

The final claim which Wolff and Gourlay seek to dismiss is that arising under Section 20 of the Securities Exchange Act (15 USC 78t). Because the liability it creates is entirely vicarious in nature, we grant this part of the motions.

Section 20 makes it clear that, for one to be liable as a "controlling person", there must be a "person liable

under any provisions of this chapter or of any rule or regulation thereunder" who is controlled. Here it is alleged that Omni International is the controlled entity. However, the only claims asserted against Omni are under Sections 10 and 17(a), pursuant to a regulation found in Chapter 2A of Title 15, as to which we have decided plaintiffs have no claim.

UNITED STATES DISTRICT JUDGE[1]

May 13, 1983

1 The foregoing "Order and Reasons: Motion to Dismiss" is a transcription of that order entered by the District Court on May 16, 1983. This transcription is offered in compliance with Supreme Court Rule 33.1.(c)(d).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

POINT LANDING, INC. and POINT LANDING FUEL CORP.	CIVIL ACTION NO. 80-677, consolidated with 81-590, 81-1996 and 81-4695
VERSUS	
OMNI CAPITAL, ET AL	
	SECTION "H"

MINUTE ENTRY

The motion for reconsideration of order for dismissal filed on behalf of defendant and third-party defendant Rudolf Wolff & Co. ("Wolff") and the motion for reconsideration filed on behalf of third party defendant James Gourlay were previously taken under advisement on memoranda.

On May 13, 1983, this court denied motions to dismiss for lack of personal jurisdiction filed on behalf of Wolff and Gourlay, among others. Motions to dismiss for failure to state a claim

under the two securities acts were granted, on the grounds that, "as to commodities that are also securities, the commodities act preempts the securities act with respect to regulations promulgated pursuant to the securities acts." Wolff and Gourlay now ask the court to reconsider their motions to dismiss based upon lack of personal jurisdiction and to dismiss the claims against them for failure to state a claim under the Commodities Exchange Act ("CEA").

The recent Fifth Circuit decision of DeMelo v. Toche Marine, Inc., 711 F.2d 1260 (5th Cir. 1983), may relate to the issues involved in the motions to dismiss for lack of jurisdiction. The Demelo decision may prompt reevaluation of our earlier view that the question of

amenability to personal jurisdiction is based upon the totality of a defendant's activities in the United States. DeMelo may require us to consider whether a Louisiana court could have asserted personal jurisdiction under the state long arm statute where, as here, the federal statute under which the action is brought is silent as to service of process. Assuming, arguendo, that this case is before us only on claims brought under the CEA, the jurisdiction of this court is based on 28 USC §1337. Although §6c of the CEA (1974), 7 USC §13a-1, provides for nationwide venue and service of process, that provision is inapplicable to private causes of action. Since 28 USC §1337 is silent as to service of process, under DeMelo personal jurisdiction over Wolff and

Gourlay may be lacking unless based upon activities in Louisiana, as provided in the Louisiana long arm statute, La. R.S. 13:3201 et seq. The parties have not submitted briefs which address this question or the question of personal jurisdiction under the state long arm statute.

Insofar as the motions seek a dismissal of claims under the CEA, we first note that the CEA seems to apply to this case. However, we note in passing that, if the CEA does not govern the actions alleged, our earlier reasoning that the causes of action under the securities acts are preempted is inapplicable. To the extent that the discretionary trading accounts involved in this case fall outside the reach of the CEA, the securities acts and the

regulations promulgated thereunder are simply not preempted. It is also worth noting, as Wolff observes in memoranda, that the jurisdictional provisions of the securities acts, unlike 28 USC §1337, do provide for nationwide service of process and venue.

For the foregoing reasons, the motions are granted insofar as they seek reconsideration of the denial of prior motions to dismiss for lack of personal jurisdiction, which motions will be considered resubmitted (on memoranda only) upon receipt of supplemental memoranda. Counsel shall submit such supplemental memoranda no later than February 6, 1984.

After consideration of the memoranda with respect to the motions to dismiss for failure to state a claim under the CEA, the motions are denied.

UNITED STATES DISTRICT JUDGE[1]

December 21, 1983

[1]The foregoing "Minute Entry" is a transcription of that order entered by the District Court on December 22, 1983. This transcription is offered in compliance with Supreme Court Rule 33.1.(c)(d).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

POINT LANDING, INC. et al	CIVIL ACTION
VERSUS	NO. 80-677
OMNI CAPITAL INTER-NATIONAL, LTD., et al	SECTION "H"
	CONSOLIDATED WITH
WILLIAM S. SMITH, JR. et al	CIVIL ACTION
VERSUS	NO. 81-590
OMNI CAPITAL INTER-NATIONAL, LTD., et al	SECTION "H"
	CONSOLIDATED WITH
FRANK J. GEORGE, et al	CIVIL ACTION
VERSUS	NO. 81-1996
OMNI CAPITAL INTER-NATIONAL, LTD., et al	SECTION "H"
	CONSOLIDATED WITH
DENNIS M. ROSENBERG, et al	CIVIL ACTION
VERSUS	NO. 81-4695
OMNI CAPITAL INTER-NATIONAL, LTD., et al	SECTION "H"

JUDGMENT

Considering the court's Order and Reasons filed herein dated June 11, 1984;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant and third-party defendant, Rudolf Wolff & Co., Ltd., and against Point Landing, Inc., Point Landing Fuel Corporation, Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, dismissing all claims against Rudolf Wolff & Co., Ltd., with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third-party defendant, James Gourlay, and against third-party plaintiffs, Omni Capital International, Ltd., Omni Capital Corporation, and Northglen Capital Corporation, dismissing all claims against James Gourlay, with costs.

The court determines that there is no just reason for delay and expressly designates this Judgment to be final judgment of this Court under Rule 54(b).

New Orleans, Louisiana, this 15th day of June, 1984.

UNITED STATES DISTRICT JUDGE[1]

[1]The foregoing "Judgment" is a transcription of the judgment entered by the District Court entered June 15, 1984. This transcription is offered in compliance with Supreme Court Rule 33.1.(c)(d).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

POINT LANDING, INC., et al	CIVIL ACTION
VERSUS	NO. 80-677
OMNI CAPITAL, et al	and consolidated cases
	SECTION "H"

ORDER AND REASONS

On May 13, 1983, motions to dismiss for lack of personal jurisdiction filed on behalf of Wolff, Gourlay, and others were denied. By minute entry dated December 21, 1983, motions by Wolff and Gourlay for reconsideration of the motions to dismiss for lack of personal jurisdiction were granted. Counsel were directed to submit supplemental memoranda addressing the question of personal jurisdiction under the state long-arm statute, particularly in light of the Fifth Circuit decision in DeMelo v. Toche Marine, Inc., 711 F.2d 1260

(5th Cir. 1983). Those memoranda have now been submitted. For the following reasons, the motions by Wolff and Gourlay are granted.

Parties adverse to movers make an interesting and indeed persuasive argument that DeMelo has no application to this entirely federal question case. However, we read DeMelo as controlling: unless jurisdiction can be asserted under the Louisiana long-arm statute, there is no personal jurisdiction over Wolff or Gourlay.

In our original Order and Reasons last May, we noted that there were very few if any activities in Louisiana by either mover. Applying a test of total activity in the United States (which DeMelo teaches was erroneous), we held that Wolff and Gourlay were subject to

personal jurisdiction solely on a "causes effects" basis. The sole "causes effects" provision in the Louisiana long-arm statute applies only to a defendant who "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state." La. R.S. 13:3201(d). That provision is clearly not applicable.

Since the terms of the Louisiana long-arm statute are not met, a due process analysis is unnecessary. However, restricting our inquiry (as DeMelo directs) to Louisiana activity, we observe that even if the Louisiana statute were applicable by its terms, due process considerations would require us to grant the motions under consideration.

We expressly determine that there is no just reason for delay and direct entry of a final judgment dismissing all claims against Wolff and Gourlay. Fed. R. Civ. P. 54(b).

UNITED STATES DISTRICT JUDGE[1]

June 11, 1984

[1]The foregoing "Order and Reasons" is a transcription of the order entered by the District Court on June 11, 1984. This transcription is offered in compliance with Supreme Court Rule 33.1.(c)(d).

OPPOSITION

BRIEF

86-740

No.

IN THE

Supreme Court of the United States

October Term, 1986

OMNI CAPITAL INTERNATIONAL, *et al.*,

Petitioners,

v.

RUDOLF WOLFF & CO., LTD., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHELDON H. ELSEN
Counsel of Record
CLEMENT J. COLUCCI
ORANS, ELSEN & LUPERT
One Rockefeller Plaza
New York, New York 10020
(212) 586-2211

MICHAEL S. FAWER
FAWER, BRIAN, HARDY
& ZATZKIS
Suite 2355
Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

JEROME LIPPER
TENZER, GREENBLATT, FALLON
& KAPLAN
405 Lexington Avenue
New York, New York 10017

Attorneys for Respondent James Gourlay

QUESTIONS PRESENTED

1. Whether the Commodity Exchange Act, 7 U.S.C. §1 *et seq.*, provides for nationwide service of process in private actions brought under that Act.

2. Whether, not withstanding the express language of Rule 4(e), a federal district court, in a federal question case, may assert personal jurisdiction, on the basis of a defendant's aggregate contacts with the United States.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Respondent James Gourlay submits this brief in opposition to the petition of Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, Richard Friedberg, and Michael Stern praying that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered July 25, 1986.

STATEMENT OF THE CASE

Respondent James Gourlay was a third-party defendant in three of four actions consolidated in the United States District Court for the Eastern District of Louisiana. Two Louisiana corporations, Point Landing, Inc. and Point Landing Fuel Corporation (collectively "Point Landing") sued two New York corporations, Omni Capital International, Ltd. and Omni Capital Corporation (collectively "Omni"); their broker, Rudolph Wolff & Co. Ltd. ("Wolff"), a British corporation; and Richard Friedberg, Michael Stern, and Barry Minsky, officers or employees of Omni. Omni impleaded James Gourlay, an Englishman associated with Wolff, and Main, Hurdman, an accounting firm. William and Ruby Smith and Frank and

Brenda George sued Omni; Northglen Capital Corporation ("Northglen"); Friedberg, Stern, and Minsky; and Competex, S.A., a now-defunct Swiss corporation that has never appeared in the action. In the Smith and George actions, Omni and Northglen filed third-party commplaints against Wolff, Gourlay, and Main, Hurdman. One action, brought by Dennis and Joan Rosenberg, did not involve any of the third-party defendants. It was not involved in the appeal to the United States Court of Appeals for the Fifth Circuit and is not before this Court.

Plaintiffs asserted claims under sections 10(b) and 20 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b), 78t, and Rule 10b-5, 17 C.F.R. §240 10b-5, section 17(a) of the

Securities Act of 1933 ("Securities Act"), 15 U.S.C. §77q(a), and, under pendent jurisdiction, state law. Plaintiffs amended their complaints to include claims under sections 4(b) and 9(b) of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§6b, 13b. Plaintiffs consented to the dismissal of the Securities Act claims. (Order and Reasons: Motion to Dismiss, May 16, 1983 - "First District Court Opinion").

The First District Court Opinion also granted motions by Gourlay and Wolff to dismiss the Exchange Act claims on the grounds that, as to commodities that are also securities, the CEA preempts Securities Act or Exchange Act claims with respect to transactions as to which the Commodity Futures Trading Commission ("CFTC"), and not the Securities and

Exchange Commission ("SEC"), has exclusive regulatory jurisdiction.* The district court, however, denied Gourlay's and Wolff's (and Barry Minsky's) motions to dismiss for lack of personal jurisdiction. After granting Gourlay's and Wolff's motion for reconsideration, (Minute Entry, December 21, 1983 - "Second District Court Opinion"), the district court reversed its ruling and held that it lacked personal jurisdiction over Gourlay and Wolff. (Order and Reasons, June 11, 1984 ("Third District Court Opinion"). The court reasoned that

* This was the principal issue before the Fifth Circuit, which invited the views of the CFTC and the SEC as amicus curiae before the en banc rehearing. The two agencies charged with administering the CEA and the Securities Act and Exchange Act agreed with respondent's position that the CEA preempted the Exchange Act claims. The Fifth Circuit en banc agreed unanimously with that position. That issue is not before this Court.

since the CEA did not authorize nationwide service of process, Rule 4(e) of the Federal Rules of Civil Procedure required use of the Louisiana long-arm statute. (The court found Gourlay's and Wolff's contacts with Louisiana insufficient to sustain personal jurisdiction under the statute, a finding not challenged on appeal or before this Court.) That ruling was affirmed, on one ground by a unanimous United States Court of Appeals for the Fifth Circuit en banc and on another by a divided court.

The Fifth Circuit unanimously held that the CEA does not expressly or impliedly authorize nationwide service of process in private actions. A divided court held that in the absence of a specific statute authorizing nationwide service of process, Rule 4(e) requires a

federal district court to look to the forum state's long-arm statute as the basis for personal jurisdiction over nonresident defendants, not to the defendant's aggregate contacts with the United States. These holdings are the subject of the present petition for certiorari.

REASONS FOR DENYING THE WRIT

Petitioners invite this Court to correct what they believe to be the Congress's mistakes. What they consider "mistakes," however, are decisions for Congress. Petitioners' proposed corrections would shatter the bedrock principle that the "[f]ederal courts are courts of limited jurisdiction. Their personal jurisdiction, no less than their subject matter jurisdiction, is subject to constitutional and statutory

constraints." Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 710 (1982) (Powell, J., concurring). The Fifth Circuit's unanimous decision that the CEA does not authorize nationwide service of process is clearly correct and undisputed elsewhere. The Fifth Circuit's majority opinion rejecting judicial creation of jurisdiction based on aggregate national contacts is likewise clearly correct, consistent with the holdings of every other circuit that has addressed the issue, and squarely challenged only in a few isolated district court cases. Therefore, this case does not warrant review by this Court.

1. The Fifth Circuit Correctly Decided That the Commodity Exchange Act Does Not Provide for Nationwide Service of Process

The Fifth Circuit unanimously and correctly held that the CEA does not provide for nationwide service of process in a private action.* Such other authority as there is holds likewise. Gravois v. Fairchild, Arabatzis, et al., [1977-1980 Transfer Binder] CCH Comm. Fut. L. Rep. ¶20,706 (E.D. La. 1978). See also Shelley v. Noffsinger, 511 F. Supp. 687, 689 (N.D. Ill. 1981); Gould v. Barnes Brokerage Co., 345 F. Supp. 294, 295 (N.D. Tex. 1982) (pre-1982 amendments cases sustaining jurisdiction under 28 U.S.C. §1337, which has no provision for nationwide service of process).

The CEA expressly confines nationwide service of process to official action by

* Although petitioners' statement of the "Question Presented" appears not to challenge this holding, (Petition, p. i), the Petition as a whole raises the question.

either the CFTC or state authorities, or related actions. Nothing in the CEA expressly provides for nationwide service of process in private actions. Section 13a-1 of the CEA provides nationwide service of process in actions brought by the CFTC. Section 13a-2 provides for nationwide service in actions brought by state officials, and section 18(d) does the same for actions by persons seeking to enforce a CFTC order rendered on their behalf.

These detailed and limited*

jurisdictional provisions were unchanged

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* The contrast between the jurisdictional sections of the CEA and with the broad language of §27 of the Exchange Act, 15 U.S.C. §78aa is enough to dispose of any purported analogy to the federal securities laws. Section 27 provides in relevant part for exclusive jurisdiction, with nationwide service of process, "of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

in any relevant respect by the Futures Trading Act of 1982, in which Congress expressly created a private right of action under the CEA after this Court's decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) implied one. Congress enacted 7 U.S.C. §25, representing its considered judgment on the proper scope of private actions under the CEA. It was aware of procedural questions. See 7 U.S.C. §25(c) (creating exclusive federal jurisdiction and a two-year statute of limitations). Congress also amended §§ 13a-1, 13a-2, and 18(d) extensively. Nevertheless, Congress did not provide nationwide service of process in private actions brought under the CEA. The only reasonable inference is that Congress did not intend to provide it.

Petitioners' only real argument for implying nationwide service of process in private actions brought under the CEA is that Congress had a broad remedial purpose in enacting the CEA and permitting private actions, and that the implication of nationwide service of process is necessary to effectuate this purpose. Petitioners advance three contentions to support this argument.

First, petitioners contend that the CEA expresses an important policy, and that, therefore, Congress intended private plaintiffs under the CEA to have the benefit of nationwide service of process. Courts have not, however, relied on the importance of the relevant federal policy to extend their own

jurisdiction in the absence of clear statutory authorization.*

Second, petitioners contend that this Court's decision in Curran, supra, 456 U.S. 353 (1982), requires nationwide service of process. Curran, in fact, says nothing whatsoever on the topic. Indeed, petitioners' Curran-based argument is nothing more than a reiteration of their previous argument that allegations of commodities fraud are worthy, as are private actions, and, therefore, that nationwide service of process must be implied. Congress did

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* See, e.g. Central Operating Co. v. Utility Workers of America, AFL-CIO, 491 F.2d 245 (4th Cir. 1974) (Labor-Management Relations Act); Safeguard Mutual Ins. Co. v. Maxwell, 53 F.R.D. 116 (E.D. Pa. 1971) (Civil Rights Act); Bernard v. Richter's Jewelry Co. 53 F.R.D. 606 (S.D.N.Y. 1971) (Truth-in-Lending Act); Interstate Commerce Commission v. Agricultural Cooperative Ass'n, 34 F.R.D. 497 (S.D. Iowa 1964) (Interstate Commerce Act).

not take such a position when it amended the CEA after Curran, and neither has any court.

Third, petitioners contend that the exclusive character of federal jurisdiction over private CEA claims requires nationwide service of process. But Congress is fully capable of expressing its jurisdictional intentions. It sometimes creates exclusive federal jurisdiction without providing for nationwide service of process, See, e.g., 28 U.S.C. § 1338 (cases involving patents, copyrights, etc.); 28 U.S.C. § 1351 (cases involving members of diplomatic missions), and sometimes creates exclusive federal jurisdiction while providing for nationwide service of process. See, e.g., 15 U.S.C. §§ 15,22 (antitrust

cases); 15 U.S.C. § 78aa (securities cases).

Petitioners' real argument is not with the Fifth Circuit, but with the Congress. Congress is the body to competent to decide when it wants nationwide service of process and when it does not. Congress decided that it did not want nationwide service of process in private actions under the CEA. Petitioners disagree with this decision, but it is the Congress's to make. Mere disagreement with the wisdom of a Congressional decision does not provide grounds for review in this Court.

2. In the Absence of Congressional Authorization, Federal Courts Cannot Imply Personal Jurisdiction Based on Aggregate National Contacts

The Fifth Circuit, in common with every other circuit that has reached the

issue, rejected petitioners' alternative argument that a federal district court may exercise personal jurisdiction over a defendant based on that defendant's aggregate contacts with the United States as a whole, not with any particular state. Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 383 (1985) (rejecting national contacts test in patent actions); Webber v. Michela, 633 F.2d 518 (8th Cir. 1980) (same: civil rights case); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977) (same: Lanham Act case).

This result is mandated by Rule 4(e) of the Federal Rules of Civil procedure. Rule 4(e) provides:

> Whenever a statute of the United States or an order of court thereunder provides for service of a

summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule. (emphasis added).

Since no federal statute provides nationwide service of process in this case, the district court could not assert jurisdiction over Gourlay unless service was made "under the circumstances and in the manner" prescribed by the Louisiana

long-arm statute.* The Fifth Circuit, along with every other circuit that has considered the issue, held that this "under the circumstances" language requires federal courts to look to the state long-arm statute. George v. Omni International, Ltd., 795 F.2d 415 (5th Cir. 1986); Max Daetwyler Corp, v. R. Meyer, 762 F.2d 290 (3d Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 383 (1985); Webber v. Michela, 633 F.2d 518 (8th Cir. 1980); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977). The cases cited as contrary authority do not, on examination, support petitioners' claims or demonstrate a conflict for this Court to resolve.

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* The "under the circumstances" language was added as part of the 1963 amendments to the Federal Rules of Civil Procedure.

Petitioner cites two inapplicable Sixth Circuit cases, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir. 1981) and Handley v. Indiana & Michigan Electric Co, 732 F.2d 1265 (6th Cir. 1984). Chrysler explicitly refused to apply national contacts analysis because it was clear that defendant's contacts would have been insufficient in any event. 643 F.2d at 1239. Handley endorsed the theory in dictum, but actually applied, though arguably misapplied, the Kentucky long-arm statute. 732 F.2d at 1271.

Kramer v. Scientific Control Corp., 365 F. Supp. 780 (E.D. Pa. 1973) involved the federal securities laws, which explicitly provide for nationwide service of process. The court's discussion of national contacts theory appears in

context to be a constitutional justification of those service provisions. 365 F. Supp. at 787.

In most of the other cases cited by petitioner or the Fifth Circuit dissenters, the real basis for decision was the state long-arm statute. Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722 (D. Utah 1973); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (W.D. Ohio 1967); First Flight Co. v. National Car Loading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962); Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659 (D.N.H. 1977) (alternative holding); C. Holt v. Klesters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973) (jurisdiction asserted on national contacts, but case then transferred to district in state with numerous contacts).

Only Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1977), of all the cases petitioners cite, squarely conflicts with the Fifth Circuit's holding. Cryomedics simply cannot be reconciled with the unambiguous command of Rule 4(e). Indeed, the court did not even refer to the Rule.

Because of the overwhelming majority of cases that reject judicial enactment of a national contacts jurisdictional statute in the teeth of Rule 4(e),* and the absence of any decision by a circuit

*See, e.g., Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), cert. denied, ___ U.S. ___, 106 S. Ct. 383 (1985); Webber v. Michela, 633 F.2d 518 (8th Cir. 1980); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977); Mu-Petco Shipping Co. v. Divesco, Inc., 101 F.R.D. 753 (S.D. Miss. 1984); Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414 (E.D. Pa. 1979); Navarro v. Sedco, Inc., 449 F. Supp. 1355 (S.D. Tex. 1978).

court that conflicts with the Fifth Circuit decision in this case, there is no conflict requiring resolution by this Court.

Petitioners argue that this conclusion leads to the anomalous result that enforceability of federal rights might vary from state to state. (Petition, pp. 31-32). Apparently, they object to this because it prevents uniform administration of federal law. But Congress frequently conditions assertion of federal rights on the requirements of state law, even though the predictable result is a lack of uniformity. See, e.g. Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985) (collecting cases).

The more important point, however, is that the policy decision to

make personal jurisdiction of the federal courts depend in part on state law is for the Congress, which, within constitutional limits not at issue here, controls the jurisdiction of the federal courts. Petitioners' complaints are properly addressed to the Congress and should not be reviewed by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SHELDON H. ELSEN
Counsel of Record
ORANS, ELSEN & LUPERT
One Rockefeller Plaza
New York, New York 10020
(212) 586-2211
Counsel for Respondent
James Gourlay

Of Counsel:
Sheldon H. Elsen
Clement J. Colucci

TENZER, GREENBLATT, FALLON
& KAPLAN
405 Lexington Avenue
New York, New York 10174

Of Counsel:
Jerome Lipper

FAWER, BRIAN, HARDY &
ZATZKIS
Suite 2355
Pan American Life Center
601 Poydras Street
New Orleans, Louisiana
70130

Of Counsel:
Michael S. Fawer

OPPOSITION

BRIEF

No. 86-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OMNI CAPITAL INTERNATIONAL, LTD., ET AL.,

Petitioners,

—v.—

RUDOLF WOLFF & CO., LTD., ET ALIUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT RUDOLF WOLFF & CO., LTD. IN OPPOSITION

ELLIOT PASKOFF
Counsel of Record
TOWNLEY & UPDIKE
Attorneys for Respondent Rudolf Wolff & Co., Ltd.
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court below correctly hold that where a plaintiff invokes the federal question jurisdiction of a district court, premised upon a federal statute that does not provide for nationwide service of process, Rule 4(e) of the Federal Rules of Civil Procedure permits a district court to exercise *in personam* jurisdiction over a non-resident defendant only if the non-resident defendant is subject to the long-arm jurisdiction of the forum state?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Respondent Rudolf Wolff & Co., Ltd. is a subsidiary of Rudolf Wolff Ltd., a United Kingdom corporation, which is in turn owned by Noranda, Inc., a Canadian corporation.

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BRIEF OF RESPONDENT RUDOLF WOLFF & CO., LTD. IN OPPOSITION

Respondent Rudolf Wolff & Co., Ltd. ("Wolff") respectfully requests that the Court deny the Petition for a Writ of Certiorari of petitioners Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, Richard Friedberg and Michael Stern (hereinafter "Petitioners").

The *en banc* decision below of the Court of Appeals for the Fifth Circuit is in complete accord with all circuit courts and the multitude of district court decisions throughout the country which have addressed the requirements for obtaining personal jurisidiction over non-resident defendants in federal question

cases where the federal statute sued upon does not provide for nationwide service of process. In seeking to invoke the extraordinary and discretionary certiorari jurisdiction of this Court, Petitioners urge the judicial creation of a "national contacts" theory of personal jurisdiction, which is a radical departure from precedent and results in universal nationwide service of process for all federal statutes. The court below correctly declined to so dramatically affect a liberty interest and refused to judicially legislate a national long-arm statute, acknowledging that such a step into the legislative arena would constitute a violation of the separation of powers doctrine.

Where, as here, the decision below is consistent with the prior resolution of the same legal issue by five other circuit courts and does not conflict with any applicable decisions of this Court, there is no "special and important" reason warranting the issuance of a Writ of Certiorari. Sup. Ct. R. 17.1. Moreover, where Petitioners herein are advocating a standard of personal jurisdiction in federal questions cases which constitutes a drastic departure from well-established legal principles, it would be improvident to grant certiorari.

STATEMENT OF THE CASE

A. The Parties to the Action

Point Landing, Inc. and Point Landing Fuel Corp. (collectively "Point Landing"), Louisiana entities, commenced these proceedings in February 1980, seeking damages under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, § 17(a) of the Securities Act of 1933, the Louisiana Blue Sky Law, and state wrongful misrepresentation and conspiracy laws. Point Landing claimed that its damages resulted from alleged misrepresentations regarding federal income tax benefits that might be derived from an investment program using discretionary trading accounts in London to purchase and sell London Metal Exchange options and contracts in silver commodity futures traded exclusively in the United Kingdom. Similar actions were later filed by William S. and Ruby M. Smith, Frank and

Brenda A. George and Dennis M. and Joan Rosenberg. The *Point Landing*, *Smith*, *George* and *Rosenberg* suits were consolidated in 1982.

In the *Point Landing* action, defendants are two New York corporations, Omni Capital International, Ltd. and Omni Capital Corporation (collectively, "Omni"), certain officers or employees of Omni—Richard Friedberg, Michael Stern, and Barry Minsky—and Rudolf Wolff & Co., Ltd., a United Kingdom corporation having no office, employees, officers, telephone listing or registered agent in the United States. Omni impleaded James Gourlay, an alleged agent of Wolff, and Main, Hurdman, an accounting firm.

B. Prior Proceedings

In April 1982, Wolff moved to dismiss the Point Landing complaint, the Omni cross-claims and the Omni and Northglen third-party complaints pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that (1) the court lacked personal jurisdiction over Wolff; and (2) there was a failure to state a claim upon which relief could be granted under the federal securities laws. Similar motions were filed by Barry Minsky and James Gourlay. On August 24, 1982, the district court deferred ruling on Wolff's motion, pending discovery on the issue of personal jurisdiction. Prior to completing discovery, the court granted leave for the filing of amended complaints to assert purported causes of action under the Commodity Exchange Act ("CEA").

In an opinion entered May 16, 1983, ("*Point Landing I*," see Appendix[1] B-2), the district court granted Wolff's motion to dismiss the federal securities laws claims. (Appendix B-25-26). Additionally, the court held that the CEA "preempted regulations under the Securities Exchange Act [of 1934] as to securities which are commodity futures . . ." and thus granted

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1 Respondent Wolff will refer to the Appendix annexed to the Petition for Certiorari.

Wolff's motion to dismiss the claims arising under § 10b and Rule 10b-5 of the Securities Exchange Act of 1934. The court permitted plaintiffs' claims against Wolff under the CEA to remain in the action. (*Point Landing I*, Appendix B-25-26).

On the issue of personal jurisdiction, the court denied Wolff's motion to dismiss, holding that Wolff need only have sufficient minimum contacts with the *United States*—not Louisiana—to comport with due process and that a *prima facie* case for personal jurisdiction had been established by virtue of purported activities of an alleged agent of Wolff, James Gourlay. (*Point Landing I*, Appendix B-21-22).

Wolff moved the district court to reconsider its May 16, 1983 order, *inter alia*, on the ground that the court's decision on the issue of personal jurisdiction was erroneously premised on the misapplication of the nationwide jurisdictional provisions of the federal securities laws, and that no party had addressed the issue of personal jurisdiction on the remaining commodities claims under the CEA.

In an opinion dated December 22, 1983 ("*Point Landing II*," see Appendix B-31), the district court granted Wolff's motion insofar as it sought reconsideration of the personal jurisdiction issue, holding that a recent Fifth Circuit decision in *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983), prompted a reevaluation of its view that amenability to personal jurisdiction may be based upon the totality of a defendant's activities in the United States where the federal statute sued upon, *i.e.*, the CEA, is silent as to service of process. (*Point Landing II*, Appendix B-14).

Following full briefing on this issue, the district court, in June 1984, entered a final judgment pursuant to Rule 54(b) dismissing all claims against Wolff and Gourlay for lack of personal jurisdiction. ("*Point Landing III*," see Appendix B-33). The district court held that the CEA preempts private actions under § 10b of the 1934 Act, and that because the CEA does not expressly or impliedly authorize nationwide service of process in private actions, the Fifth Circuit's decision in

DeMelo required that personal jurisdiction over Wolff and Gourlay be evaluated in conformity with the Louisiana long arm statute. The district court then concluded that under the facts of record, neither the Louisiana long-arm statute nor principles of due process permitted the extension of personal jurisdiction over Wolff and Gourlay. (*Point Landing III*, Appendix B-41-42). No party to the proceedings below has challenged the district court's findings that Wolff and Gourlay are not subject to the jurisdiction of the Louisiana state courts under the Louisiana long-arm statute.[2]

An appeal of the district court's final judgment was filed shortly thereafter by Point Landing, Omni, Northglen, Richard Friedberg and Michael Stern, and oral argument on the appeal was heard on March 1, 1985 by the Hon. John Minor Wisdom, Hon. Jerre S. Williams and Hon. Robert Madden Hill of the Fifth Circuit. By order dated July 17, 1985, the Fifth Circuit, on its own motion, ordered that the submission of the appeal be vacated, with oral argument to be heard *en banc*, without the original panel issuing any opinion.

In a *per curiam* opinion filed on July 25, 1986, (Appendix A-2) the Court of Appeals for the Fifth Circuit affirmed the judgment of the district court, holding that (1) the CEA provides an exclusive cause of action arising out of the commodities futures transactions engaged in by the plaintiffs; and

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2 As the district court found, based upon comprehensive discovery conducted by Point Landing and Omni, including depositions upon oral questions taken in London, England, and upon Wolff's moving affidavit, Wolff is a United Kingdom corporation with its principal place of business in London, England. It is not qualified to do business in Louisiana or in any other state of the United States. Wolff has no employees, officers, telephone listing or registered agent in Louisiana and has no bank account, property or other assets in Louisiana. The sole contact between Wolff and Point Landing consisted of after the fact mailing of a few confirmation slips to Point Landing, reflecting transactions executed in London by Wolff at the request of Point Landing. (*Point Landing I*, Appendix B-17-19). Wolff had never met with or talked to any of the plaintiffs, whether in Louisiana or elsewhere, and had never seen the Omni investment program in which the plaintiffs participated until after this litigation was commenced.

(2) in the absence of any provision in the CEA for nationwide service of process for private actions, Rule 4(e) of the Federal Rules of Civil Procedure did not permit the court to exercise personal jurisdiction over the non-resident defendants Wolff and Gourlay because Wolff and Gourlay were not subject to personal jurisdiction under the forum state's long-arm statute. *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d 415 (5th Cir. 1986), see Appendix A-7).

Petitioners have requested that a Writ of Certiorari be issued only as to the second holding of the Fifth Circuit's *en banc* opinion concerning the exercise of personal jurisdiction over non-resident defendants under Rule 4(e) of the Federal Rules of Civil Procedure.

REASONS FOR DENYING THE WRIT

As set forth below, Petitioners have not and, indeed, could not, satisfy their burden of demonstrating a single "special and important" reason warranting the issuance of a Writ of Certiorari. The *en banc* opinion of the Fifth Circuit below is consistent with all other circuit court decisions which have ruled on the question presented to this Court for review, as well as an overwhelming number of decisions on the district court level. In addition, the opinion below is not in conflict with any decisions of this Court.

Finally, and most significantly, Petitioners have urged the creation of a theory of personal jurisdiction which will radically alter an individual liberty interest—the exercise of *in personam* jurisidiction by federal courts—not merely for claims brought under the CEA, but in all federal question cases. Petitioners have cited no statutory basis for such a departure from precedents throughout the nation, having chosen to ignore Congressional prerogative in legislation, relying solely on their own assessment of public policy considerations. Under the circumstances, the Petition herein presents no basis for the invocation of this Court's extraordinary certiorari jurisdiction.

I.

There is No Conflict Between the Decision of the Court Below and Decisions of Other Circuit Courts

A. The Decision of the Court Below

The court below was asked to resolve the issue of whether, in a federal question case in which the federal claim sued upon does not provide for nationwide service of process, personal jurisdiction over a non-resident defendant must be obtained "in accordance with Federal Rule of Civil Procedure 4(e), by applying the long-arm statute of the state in which the district court sits." *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 417 (Appendix A-3). The *en banc* panel of the Fifth Circuit answered this question affirmatively, rejecting the argument that a non-resident defendant's contacts throughout the United States may be aggregated to permit jurisdiction to be asserted over a defendant who could not be reached by the forum state's long-arm statute.

The court premised its decision on the "unmalleable principle of law" that federal courts may exercise only so much of their Article III jurisdiction as they are granted by Congress. 795 F.2d at 423 (Appendix A-13). Accordingly, a federal court may only issue process for service if authorized by a federal statute or the Federal Rules of Civil Procedure. Acknowledging that the CEA did not provide for nationwide service of process for private actions, the court found that Rule 4(e) of the Federal Rules of Civil Procedure governs the methods of service which may be used to obtain personal jurisdiction over a defendant. 795 F.2d at 423-24 (Appendix A-14-16).

The court then examined the language of Rule 4(e) and concurred with a prior Fifth Circuit interpretation of the rule that where the assertion of personal jurisdiction, and not just the service of process, depends on a state statute, "a federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it." 795 F.2d at 425 (Appendix A-17)

(quoting *Burstein* v. *State Bar of California*, 693 F.2d 511, 514 (5th Cir. 1982)). The *Burstein* court had reached this conclusion by examining the second sentence of Rule 4(e), which states:

> Whenever a statute . . . of the state in which the district court is held provides . . . for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made *under the circumstances* and in the manner prescribed in the statute . . . .

Fed. R. Civ. P. 4(e) (emphasis added). According to the *Burstein* court, the clear import of the critical phrase "under the circumstances"—which had been added to Rule 4 by the 1963 amendments to the Federal Rules—is that where a state long-arm statute is used to effectuate service of process, service may be made only upon those defendants who are subject to the jurisdiction of the forum state.[3] 693 F.2d at 514.

The *en banc* court declined to adopt the "national contacts" theory urged by the Petitioners herein, in which a federal court aggregates the totality of a defendant's contacts throughout the United States. In rejecting the "national contacts" theory, the court relied on decisions by three sister circuits which had held that in the absence of a governing federal statute authorizing nationwide service of process, Rule 4(e) did not permit a court to aggregate nationwide contacts for the purpose of asserting *in personam* jurisdiction over a non-resident defendant. *Max Daetwyler Corp.* v. *Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 106 S. Ct. 383 (1985); *Stabilisierungsfonds Fur Wein* v. *Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200 (D.C. Cir. 1981); and *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977). After reviewing these three circuit court opinions, the Fifth Circuit concluded that "absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who

3 The *en banc* court below, in approving the *Burstein* interpretation of Rule 4(e), resolved a conflict within the Fifth Circuit on the issue. (Appendix A-21).

cannot be reached by the long-arm statute of the state in which the district court sits." *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 427 (Appendix A-21).

B. The Decision Below is Consistent with All Other Circuit Court Decisions Which Have Ruled On This Issue

In addition to citing the decisions of the Third, Ninth and District of Columbia Circuits in *Daetwyler*, *Wells Fargo*,[4] and *Kaiser*, the court below observed that its decision was consistent with the "overwhelming majority" of federal courts. *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 426 (Appendix A-20). Although not cited by the court below, the Eighth and Second Circuits have also held that Rule 4(e) requires application of the forum state's long-arm statute where the federal statute sued upon does not provide for nationwide service of process. *Webber* v. *Michela*, 633 F.2d 518, 519 (8th Cir. 1980) (in a federal civil rights action, Rule 4(e) requires that personal jurisdiction over non-resident defendants be asserted under the forum state's long-arm statute); *Marsh* v. *Kitchen*, 480 F.2d 1270, 1272 n.6 (2d Cir. 1973) (in both federal question and diversity cases, Rules 4(e)-(f) authorize a district court to look to state law to determine in what manner and under what circumstances a non-resident defendant can be subject to personal jurisdiction).

Petitioners aver that the national contacts theory has been "recognized by numerous courts," citing the Sixth Circuit's opinions in *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981) and *Handley* v. *Indiana & Michigan Electric Co.*, 732 F.2d 1265 (6th Cir.

4 The holding in *Wells Fargo* has been recently confirmed by the Ninth Circuit in *Pacific Atlantic Trading Co.* v. *M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985) (in a suit arising under the district court's admiralty jurisdiction, the state long-arm statute must be applied to determine the defendant's amenability to suit in the forum). Additional authority in the Third Circuit can be found in *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981), relied upon by the *Daetwyler* court.

1984). In both *Fedders* and *Handley*, however, the Sixth Circuit analyzed the national contacts theory but *did not* hold that Rule 4(e) permits the aggregation of nationwide contacts where nationwide service is not authorized by the governing federal statute. In *Handley*, after discussing the national contacts approach to personal jurisdiction, the Sixth Circuit ultimately grounded the assertion of *in personam* jurisdiction over the non-resident defendant on the defendant's contact with the forum state under the Kentucky long-arm statute. 732 F.2d at 1271-72. In *Fedders*, the Sixth Circuit concluded, "the present case, however, does not require us to decide whether the aggregate contacts theory is consistent with the due process clause of the Fifth Amendment." 643 F.2d at 1239.

The dicta in these two Sixth Circuit decisions does not rise to the level of a "conflict" with other circuit court opinions on the proper interpretation of Rule 4(e). The absence of a conflict is reflected by a post-*Handley* district court decision within the Sixth Circuit which interpreted *Handley* as mandating the use of state long-arm standards of jurisdiction where no nationwide service of process is provided by the federal statute. *See Todd* v. *Tempest Marine, Inc.*, 623 F. Supp. 562, 564 (E.D. Mich. 1985); *see also Mitchell* v. *White Motor Credit Corp.*, 627 F. Supp. 1241, 1246 (M.D. Tenn. 1986) (post-*Handley* district court decision within the Sixth Circuit holds that in a federal question case, where state long-arm provisions are utilized to obtain service, the exercise of *in personam* jurisdiction is limited to the terms of the long-arm statute).

C. The Overwhelming Majority of District Courts Are Consistent with the Decision Below

In addition to the circuit court opinions cited above, there is an overwhelming number of federal district court decisions which, since Rule 4(e) was amended in 1963, have consistently held that Rule 4(e) mandates the application of state long-arm standards of personal jurisdiction where the federal statute sued upon does not provide for nationwide service of process. *See, e.g., Educational Testing Service* v. *Katzman*, 631 F.

Supp. 550, 552 & n.6 (D.N.J. 1986) ("While this case arises under this Court's copyright jurisdiction, service of process must be made subject to the New Jersey long-arm statute . . . ."); *Fogleman* v. *Aramco*, 623 F. Supp. 908, 910 (W.D. La. 1985) (in a case under the Jones Act, which does not provide for nationwide service of process, court holds that "when a party 'borrows' a state long-arm statute to attempt service of process, the party is bound by the state law restrictions that attach to the state long-arm procedure"); *Allan Organ Co.* v. *Elka S.p.A.*, 615 F. Supp. 328, 329 (E.D. Pa. 1985) (in a patent infringement action, *in personam* jurisdiction over a non-resident defendant is evaluated under the Pennsylvania long-arm statute); *Colon* v. *Gulf Trading Co.*, 609 F. Supp. 1469, 1474-76 (D.P.R. 1985) (holding that a district court cannot exercise nationwide personal jurisdiction in federal question cases "unless Congress, or the Supreme Court, grants the authority to implement this jurisdictional power"); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 28-29 (E.D. Mo. 1985) (in an action under the Comprehensive Environmental, Compensation and Liability Act ("CERCLA"), which does not provide for nationwide service, Rule 4(e) requires that the defendant's amenability to jurisdiction be determined by Missouri jurisdictional standards); *Wylie* v. *Mobil Oil Corp.*, No. S84-0384, slip op. (S.D. Miss. Aug. 29, 1985) (because the federal maritime statute does not provide for nationwide service of process, amenability to jurisdiction must be assessed under the Mississippi long-arm statute); *Violet* v. *Picillo*, 613 F. Supp. 1563, 1573 (D.R.I. 1985) (because CERCLA does not provide for nationwide service of process, the defendant's amenability to personal jurisdiction must be determined under the state long-arm statute); *Starline Optical Corp.* v. *Caldwell*, 598 F. Supp. 1023, 1025 (D.N.J. 1984) (in a federal question patent case, the court held that Rule 4(e) requires the use of the state long-arm statute to determine the question of *in personam* jurisdiction over a non-resident defendant); *Mu-Petco Shipping Co.* v. *Divesco, Inc.*, 101 F.R.D. 753, 755 (S.D. Miss. 1984) (in a case based on the admiralty jurisdiction of the federal court, amenability to

jurisdiction is governed by the state long-arm statute where the federal statute does not provide for service of process); *Bamford* v. *Hobbs*, 569 F. Supp. 160, 164, 167-68 (S.D. Tex. 1983) ("Because the Clayton Act does not provide for service of process on individuals, the propriety of service on [the non-resident defendant] must be gauged by the requirements of the applicable Texas long-arm statute"); *Medeco Security Locks, Inc.* v. *Fichet-Bauche*, 568 F. Supp. 405, 409-10 (D. Va. 1983) (in a patent infringement action, the court expressly rejects the aggregate national contacts theory, holding that the theory violates the alien defendant's Fifth Amendment due process rights); *Liaw Su Teng* v. *Skaarup Shipping Corp.*, No. 81-1603, slip op. at 4-5 (E.D. La. Apr. 18, 1983) (in a suit brought under the federal maritime laws, the district court held that where federal statutes are silent as to service of process, amenability to jurisdiction must be measured by state long-arm standards); *Superior Coal Co.* v. *Ruhrkole, A.G.*, 83 F.R.D. 414, 418-20 (E.D. Pa. 1979) (national contacts theory rejected because no federal statute authorizes district courts "to take nationwide contacts into consideration and therein to assume jurisdiction over alien corporations"); *Amburn* v. *Harold Forster Industries, Ltd.*, 423 F. Supp. 1302, 1304-05 (E.D. Mich. 1976) (in the absence of authority in the patent statute for nationwide service of process, the court limited consideration of defendant's minimum contacts to the forum state); *Graham Engineering Corp.* v. *Kemp Products Ltd.*, 418 F. Supp. 915, 919-20 (N.D. Ohio 1976) (in the absence of Congressional authority for a uniform federal amenability standard in federal question cases, district court in a patent action must look to the state long-arm statute to assert jurisdiction over a non-resident defendant); *Ag-tronic, Inc.*, v. *Frank Paviour Ltd.*, 70 F.R.D. 393, 401 (D. Neb. 1976) (unless the federal statute sued upon provides for nationwide service of process, the court would decline to invade the province of Congress by aggregating nationwide contacts of an alien defendant); *Stanley Works* v. *Globemaster, Inc.*, 400 F. Supp. 1325, 1337-38 (D. Mass. 1975) (service under constitutionally valid long-arm statute in federal court in a federal question case is

only possible where the in-state activities of the defendant would be sufficient to invoke the long-arm statute had defendant been sued in state court); *Bernard* v. *Richter's Jewelry Co.*, 53 F.R.D. 606, 607 (S.D.N.Y. 1971) (where the Federal Truth in Lending Act does not provide for nationwide service of process, Rule 4(e) of the Federal Rules of Civil Procedure provides that the non-resident must be amenable to jurisdiction under the forum state's long-arm statute); *California Clippers, Inc.* v. *United States Soccer Football Association*, 314 F. Supp. 1057, 1061 (N.D. Cal. 1970) (in an anti-trust action against an unincorporated association, the Clayton Act does not provide for nationwide service and thus the defendants must be subject to jurisdiction under the California long-arm statute); *Edward J. Moriarty & Co.* v. *General Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967) (use of the nationwide contacts theory is not permitted by the Federal Rules or statutes because "neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made on an alien corporation having certain minimal contacts with the United States"); *see also Todd* v. *Tempest Marine, Inc.*, *supra*, 623 F. Supp. at 564, and *Mitchell* v. *White Motor Credit Corp.*, *supra*, 627 F. Supp. at 1246, already discussed above.[5]

D. The District Court Decisions Cited by Petitioners Are Not Controlling on the Proper Interpretation of Rule 4(e)

The handful of district court opinions cited by Petitioners (Petition at 33-34) do not support the proposition that Rule 4(e) authorizes the use of aggregated national contacts in federal question cases where the federal statute sued upon does not provide for nationwide service of process. Most easily

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5 Consistent with the circuit and district court decisions cited above, Professors Wright and Miller, in their leading treatise on federal practice, have recognized the "apparent intent of the draftsmen of Rule 4(e) to use state provisions for service in order to permit the federal courts in a state to hear those cases that could be brought in the state's own courts when a basis for asserting federal subject matter jurisdiction exists." 4 C. Wright & A. Miller, Federal Practice & Procedure § 1075 at 313 (1969).

distinguished is *Kramer* v. *Scientific Control Corp.*, 365 F. Supp. 780 (E.D. Pa. 1973), where the non-resident defendant was sued under the 1933 and 1934 securities statutes, which expressly provide for nationwide service of process. *See id.* at 787. The federal statute sued upon in *Centronics Data Computer Corp.* v. *Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977)—the antitrust laws—likewise provide for nationwide service of process in suits against corporate defendants. The remaining causes of action in *Centronics* were state contractual, trade secret and defamation claims, which were before the court by virtue of diversity jurisdiction, not federal question jurisdiction. *Id.* at 660. In addition, the *Centronics* court predicated the exercise of personal jurisdiction over the non-resident defendant, based on the defendant's activities outside the state of New Hampshire, which caused effects within the state, and thus came within New Hampshire's "tort" long-arm statute. *Id.* at 665-67.

The opinion in *First Flight Co.* v. *National Carloading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1962), is inapposite because the case *preceded* the 1963 amendment to Rule 4(e), which added the "under the circumstances" language so essential to the current judicial interpretation of the rule. *See DeMelo* v. *Toche Marine, Inc.*, 711 F.2d at 1268 (rejecting an earlier Fifth Circuit decision because it relied on pre-1963 interpretations of Rule 4(e)).

The decision of the district court in *Cryomedics, Inc.* v. *Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975), which used an aggregated national contacts standard in a patent infringement action, completely overlooked or ignored Rule 4(e) of the Federal Rules of Civil Procedure, which should have controlled the assertion of *in personam* jurisdiction over the non-resident alien corporation in that case. Not surprisingly, the faulty analysis of the *Cryomedics* decision has been expressly rejected by federal circuit and district courts throughout the country, because the "national contacts" approach was found to be contrary to the language and intent of Rule 4(e). For example, the Ninth Circuit in *Wells Fargo & Co.* v. *Wells*

Fargo Express Co., 556 F.2d 406 (9th Cir. 1977), extensively analyzed the *Cryomedics* decision and concluded that it was "of dubious validity." *Id.* at 416. The *Wells Fargo* opinion also noted that two of the cases relied on by the *Cryomedics* court did not actually support the theory of adopting an aggregate national contacts approach, 556 F.2d at 417-18 & n.9 (discussing *Edward J. Moriarty & Co.* v. *General Tire & Rubber Co.*, 289 F. Supp. 381 (S.D. Ohio 1967) and *Holt* v. *Klosters Rederi A/S*,[6] 355 F. Supp. 354 (W.D. Mich. 1973)).

The district court in *Medeco Security Locks, Inc.* v. *Fichet-Bauche*, 568 F. Supp. 405 (D. Va. 1983) rejected application of the aggregate contacts theory in a patent infringement action, concluding that "[T]his court is unpersuaded by the rationale of the *Cryomedics* court . . ." *Id.* at 410. Similarly, in *Activox, Inc.* v. *Envirotech Corp.*, 532 F. Supp. 248 (S.D.N.Y. 1981), the Southern District of New York expressly declined to adopt the *Cryomedics* analysis in a patent case because it would render the jurisdictional provisions of the federal patent laws superfluous. *Id.* at 250. For other cases expressly rejecting the *Cryomedics* decision, *see Ag-Tronic, Inc.* v. *Frank Paviour Ltd.*, 70 F.R.D. 393, 401 (D. Neb. 1976); *Graham Engineering Corp.* v. *Kemp Products Ltd.*, 418 F. Supp. 915, 919 & n.3 (N.D. Ohio 1976); and *Ingersoll Milling Machine Co.* v. *J.E. Bernard & Co.*, 508 F. Supp. 907, 910 & n.4 (N.D. Ill. 1981).

In sum, the few district court cases relied upon by Petitioners in support of the "aggregate contacts" theory of *in personam* jurisdiction are either distinguishable on their facts or have been widely discredited by other circuit and district

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6 The opinion of the district court in *Holt* v. *Klosters Rederi*, cited by the Petitioners herein, is similar to the *Cryomedics* decision in that *Holt* completely ignores the governing provisions of Rule 4(e) of the Federal Rules of Civil Procedure. The *Holt* decision also relies heavily on *Edward J. Moriarty & Co.* v. *General Fire & Rubber Co.*, *supra*, a case which *expressly declined* to adopt the nationwide contacts approach because "neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimal contacts with the United States." 289 F. Supp. at 390.

court opinions. Moreover, the Petition for Certiorari herein fails to address the vast body of case law on the circuit and district court levels which, as discussed in detail above, rejects the approach to personal jurisdiction in federal question cases advocated by Petitioners.

The *en banc* decision of the Fifth Circuit below correctly followed the well-established legal principles set forth in this body of case law which adheres to the intendment of Rule 4(e). Accordingly, this is not an appropriate case for the discretionary exercise of this Court's certiorari jurisdiction.

II.

The Decision of the Court Below Does Not Conflict with Any Applicable Rulings of This Court

The *en banc* decision below concerning the assertion of *in personam* jurisdiction over non-resident defendants in federal question cases under Federal Rule 4(e) does not conflict with any applicable rulings of this Court. Petitioners attempt to convey the appearance of such a conflict by stating that the decision of the court below is contrary to this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, v. *Curran*, 456 U.S. 353 (1982) (Petition at 19, 27-28). As Petitioners concede, however, *Curran* merely recognized an implied private right of action under the CEA—a holding which addresses the extent of a federal court's *subject matter* jurisdiction under a federal statute and has nothing whatsoever to do with the assertion of *in personam* jurisdiction in a federal question case.

Petitioners' confusion and commingling of personal and subject matter jurisdictional concepts is evident in their argument that the decision below is contrary to this Court's assessment of the importance of private claims under the CEA in *Curran*. In affirming the district court's dismissal of claims against the alien defendants, the Fifth Circuit below merely ensured that *in personam* jurisdiction—a liberty interest—has been properly obtained before subject matter jurisdiction under the CEA is exercised.

Petitioners' reliance on the mere existence of the private right of action provision in the CEA (Petition at 28-30) is similarly misplaced. The fact that Congress ultimately enacted an express private right of action provision in the CEA, 7 U.S.C. § 25, and provided that such claims be brought exclusively in federal court, bears only on the issue of subject matter jurisdiction, and not the assertion of *in personam* jurisdiction in cases brought pursuant to that section of the Act. As the Ninth Circuit in *Wells Fargo* observed, "[N]ot all federal statutes which grant a federal right to recovery and provide for suit in federal court contain an additional provision granting such broad service of process powers." 556 F.2d at 418.[7]

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7 The legislative history of the CEA indicates that Congress, by providing for private rights of action, did not intend to rely on "private litigants as a policeman of the Commodity Exchange Act." H.R. Rep. No 565, 97th Cong. 2d Sess. 57, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3871, 3906. Although Congress had provided nationwide service of process for CFTC-commenced enforcement actions, such broad process powers were not included for the private claim provision, which was intended to be a supplemental remedy, "not [a] substitute for the regulatory and enforcement program of the CFTC." *Id.* Therefore, contrary to Petitioners' assertion that the Fifth Circuit has improperly imposed jurisdictional limitations on private actions under the CEA and "immunized" a non-resident defendant from suit (Petition at 20, 34), it is *Congress* which imposed the limitations by declining to provide nationwide service of process for such private claims. It would be a simple matter for Congress to amend § 25 of the CEA to include a nationwide service of process provision. Barring such an amendment, however, there is no legislative authority in the CEA for the broad jurisdictional approach sought by Petitioners herein.

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III

Petitioners' National Contacts Theory Constitutes a Drastic Departure from Congressionally-Mandated Standards of Personal Jurisdiction in Federal Question Cases

Petitioners urge this Court to create a "national contacts theory" of personal jurisdiction which, contrary to Congressional intent, would result in a massive expansion of the scope of *in personam* jurisdiction in *all* federal question cases. Clearly, this Court should not exercise its discretionary certiorari jurisdiction for the purpose of usurping the role of Congress in setting the limits of personal jurisdiction exercised by the federal courts.

A. Congress Did Not Intend to Provide Nationwide Service of Process In All Federal Question Cases

Petitioners contend that irrespective of the language of Rule 4(e) of the Federal Rules of Civil Procedure, the national policy behind the enactment of the CEA demands the application of nationwide process and nationwide jurisdictional standards in a private action brought under the CEA. (Petition at 20-27). Petitioners believe that even though Congress chose not to include nationwide service of process for private claims brought under the CEA,[8] it is appropriate for this Court to create nationwide service for private claims in order to effectuate Congressional intent to create a strong regulatory scheme under the CEA.

8 The holding of the court below, acknowledging that not all claims under the CEA have been accorded nationwide service of process, is consistent with analogous decisions interpreting the assertion of personal jurisdiction under the Clayton Act, which provides nationwide service of process only for claims against corporate defendants, and not for claims against individuals and unincorporated associations. *See Bamford* v. *Hobbs*, 569 F. Supp. 160, 164 (S.D. Tex. 1983); *California Clippers, Inc.* v. *United States Soccer Football Association*, 314 F. Supp. 1057, 1061 (N.D. Cal. 1970).

Although Petitioners couch their argument in support of the national contacts theory in terms of the policy demands of the CEA, in fact, adoption of Petitioners' national contacts argument cannot be confined to the CEA. Taking Petitioners' argument to its logical conclusion, the scope of personal jurisdiction under *all* federal statutes would be expanded to include nationwide service of process, regardless of what standard of personal jurisdiction *Congress* believed was appropriate to include in a particular federal statute. Thus, the Fifth Circuit below observed that the *Daetwyler* court "implied that if the national contacts theory is accepted, it in effect reads a nationwide service of process provision into all federal laws when an alien is a defendant." *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 426 (Appendix A-19).

Petitioners offer no justification for asking this Court to create universal nationwide process in all federal question cases, other than the subjective policy judgment that such a decision would, allegedly, strengthen regulatory enforcement of the commodities laws. However, there are numerous federal statutes other than the CEA which have similar regulatory or remedial objectives, but for which Congress *did not* provide nationwide service of process. Such federal statutes include Title VII of the Civil Rights Act, the federal patent, copyright and trademark laws, the Labor Management Relations Act, the Fair Credit Reporting Act, the Truth in Lending Act, and claims against individuals and unincorporated associations under the Clayton Act. Under the rationale of Petitioners' aggregate contacts theory, nationwide service of process would be judicially read into these federal statutes, as well as the innumerable federal statutes which do not provide for nationwide service of process.

The language of Federal Rule 4(e) specifically contemplates that not all federal statutes provide for nationwide service of process. Three different standards of amenability to jurisdiction are provided by Rule 4(e), depending on whether the federal statute which has given rise to the exercise of federal

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The court below in the instant case properly applied Rule 4(e)'s three-part jurisdictional standard to the commodity claims asserted against Wolff, and held that because the CEA does not provide for nationwide service of process for private causes of action, *in personam* jurisdiction against Wolff must be found under the forum state's long-arm statute.

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9 The dissenting opinion in the decision below took the position that the judiciary can read nationwide service of process provision into the CEA by relying on the general administrative and policy statements contained in Rules 1, 82 and 83 of the Federal Rules of Civil Procedure. *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 428-30 (Wisdom, J., dissenting) (Appendix A-23-27). Wolff respectfully submits that the dissent incorrectly concludes that Rule 4 is "silent" on the issue of process, thus leaving a void in the law. As noted by the district court in *Violet* v. *Picillo*, *supra*:

> [T]his is not simply a case of statutory construction where it falls to a court to interpret statutory ambiguity, or silence, in the manner suggested by the statute's legislative history and its purpose. Rather, by virtue of the approach prescribed by the Federal Rules of Civil Procedure regarding personal jurisdiction in federal question cases, this is an instance where congressional silence is assigned a presumptive meaning—namely, that the federal district courts will observe the territorial limits of the respective states in which they sit.

613 F. Supp. at 1573.

B. The National Contacts Theory Violates the Separation of Powers Doctrine

The national contacts theory of personal jurisdiction not only renders superfluous the tripartite scheme contemplated by Congress in Rule 4(e), more importantly, the national contacts theory does violence to the constitutional safeguard of the separation of powers doctrine. As the court below observed, "That federal courts should determine their own personal jurisdiction is a proposition fundamentally at odds with our government of separated powers." *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 423 (Appendix A-13). In declining to stray outside the boundaries of personal jurisdiction set by Congress, the Fifth Circuit quoted the language of Justice Powell that "As courts of limited jurisdiction, the federal courts possess no warrant to create jurisdictional law of their own." 795 F.2d at 423 (Appendix A-13) (quoting *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 711 (Powell, J., concurring)).

Like the Fifth Circuit, both the Third and Ninth Circuits have declined to depart from the requirements of Rule 4(e) to adopt the national contacts theory of personal jurisdiction, acknowledging judicial deference to Congress in setting the statutory limits of personal jurisdiction in federal statutes and under the Federal Rules of Civil Procedure. Thus, in *Max Daetwyler Corp.* v. *Meyer, supra*, the Third Circuit premised its analysis on the principle that "because personal jurisdiction necessarily addresses both the power of the court to create or affect legal interests and the rules of competence whereby adjudicatory authority is asserted, it is tested against both constitutional and statutory standards." 762 F.2d at 293. The *Daetwyler* court rejected the aggregate national contacts theory of personal jurisdiction, concluding that "[w]e are . . . unaware of any federal statute which presently authorizes district courts to found jurisdiction upon such aggregated contacts." *Id.* at 295.

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The Court of Appeals for the Ninth Circuit reached the same conclusion as the Fifth Circuit below and the Third Circuit in *Daetwyler* that courts are not free to create a federal amenability standard where Congress has spoken to the contrary in the Federal Rules. *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 416-19 (9th Cir. 1977). As the *Wells Fargo* court noted, "not only must the requirements of due process be met before a court can properly assert *in personam* jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature." *Id.* at 416. The Ninth Circuit therefore concluded that if public policy considerations support a nationwide contacts theory of personal jurisdiction, then "the Federal Rules should be amended to authorize such a practice. Such a step is, however, not ours to take." *Id.* at 418; *see Violet* v. *Picillo*, *supra*, 613 F. Supp. at 1573 (the district court acknowledged that nationwide service of process under the federal toxic waste statute would serve commendable objectives, but concluded that "the decision whether to allow extraterritorial process is for Congress, and not the courts to make"); *see also Johnson Creative Arts, Inc.* v. *Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984) (Federal Rules of Civil Procedure and other congressional mandates limit exercise of personal jurisdiction in federal question cases); 2 J. Moore, J. Lucas, H. Fink & C. Thompson, *Moore's Federal Practice* ¶ 4.02[3] at 4-67 (1986) ("the federal district courts may only issue process for service within the territorial limits validly authorized by a federal statute or the Federal Rules").

Even one of the district court cases principally relied upon by Petitioners, *Centronics Data Computer Corp.* v. *Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977) (Petition at 33-34), concedes that the national contacts theory "has not been generally accepted and there is no specific statutory authority for it. Congress could well have passed a statute stating that jurisdiction over aliens will be based upon their contacts within the nation as a whole . . . ." *Id.* at 664.

Recognizing Congressional prerogative to set the limits of personal jurisdiction in federal question cases, the court below

concluded that "we cannot blink the language of Rule 4(e)." *Point Landing, Inc.* v. *Omni Capital International, Ltd.*, 795 F.2d at 427 (Appendix A-21). Respondent Wolff respectfully submits that this Court should likewise decline to "blink" the provisions of Rule 4(e) and should deny the Writ of Certiorari sought by Petitioners herein.

CONCLUSION

For the the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ELLIOT PASKOFF
Counsel of Record

and

SANDRA EDELMAN
Attorneys for Respondent
Rudolf Wolff & Co., Ltd.
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

Of Counsel:

TOWNLEY & UPDIKE

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ELLIOT PASKOFF
Counsel of Record

and

SANDRA EDELMAN
Attorneys for Respondent
Rudolf Wolff & Co., Ltd.
405 Lexington Avenue
New York, New York 10174
(212) 973-6000

Of Counsel:

TOWNLEY & UPDIKE

JOINT

APPENDIX

No. 86-740

In The
Supreme Court of the United States
October Term, 1986

OMNI CAPITAL INTERNATIONAL, LTD., ET AL.,
Petitioners,

vs.

RUDOLF WOLFF & CO., LTD., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

ROBERT A. KUTCHER*
JOHN D. FRICKE
BRONFIN, HELLER,
STEINBERG & BERINS
650 Poydras Street
2500 Poydras Center
New Orleans, LA 70130
(504) 568-1888
Counsel for Petitioners

SHELDON H. ELSEN*
CLEMENT J. COLUCCI
ORANS, ELSEN & LUPERT
One Rockefeller Plaza,
33rd Floor
New York, New York 10020
(212) 586-2211
Counsel for Respondent,
James Gourlay

ELLIOT PASKOFF*
SANDRA EDELMAN
TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10174
(212) 973-6000
Counsel for Respondent,
Rudolf Wolff & Co., Ltd.

ANITA WARNER*
HURLEY & HOFFMANN
925 Common Street
Suite 825
New Orleans, LA 70112
(504) 522-0807
Counsel for Respondents,
Point Landing, Inc., et al.

*Counsel of Record

PETITION FOR CERTIORARI FILED OCTOBER 22, 1986
CERTIORARI GRANTED JANUARY 27, 1987

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April 21 1980	Answer filed by Omni Capital International, Ltd., Omni Capital Corporation, Richard Friedberg and Michael Stern in "Point Landing, Inc., et al vs. Omni Capital International, Ltd., et al", C.A. No. 80-677.
February 11, 1981	Complaint filed in "William S. Smith, et al vs. Omni Capital International, Ltd., et al", C.A. No. 81-590.
May 15, 1981	Complaint filed in "Frank J. George, et al vs. Omni Capital International, Ltd., et al", C.A. No. 81-1996.
May 28, 1981	Minute Entry entered by District Court ordering that C.A. No. 81-590 be consolidated with C.A. No. 80-677.
July 31, 1981	Answer of Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, Richard Friedberg and Michael Stern in "William S. Smith, et al vs. Omni Capital International, Ltd., et al", C.A. No. 81-590.
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	tion, Richard Friedberg and Michael Stern in "Frank J. George, et al vs. Omni Capital International, Ltd., et al", C.A. No. 81-1996.
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July 31, 1981	Third party complaint filed by Omni Capital International, Ltd., and Omni Capital Corporation against Main, Hurdman, C.P.A., and James Gourlay in "Point Landing, Inc., et al vs. Omni Capital International, Ltd., et al", C.A. No. 80-677.
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September 3, 1981	Minute Entry by District Court ordering consolidation of C.A. No. 81-1996 with C.A. No. 80-677.
November 25, 1981	Complaint filed in "Dennis M. Rosenberg, et al vs. Omni Capital International, Ltd., et al", C.A. No. 81-4695.

December 30, 1981	Motion to Dismiss for lack of personal jurisdiction, subject matter jurisdiction and improper venue filed by James Gourlay in C.A. No. 80-677 and consolidated cases C.A. No. 81-590 and C.A. No. 81-1996.
February 22, 1982	Motion to Dismiss filed by Rudolf Wolff & Co., Ltd. in C.A. No. 80-677 and consolidated cases C.A. No. 81-590 and C.A. No. 81-1996.
August 31, 1982	Minute Entry by District Court ordering consolidation of C.A. 81-4695 with C.A. No. 80-677.
September 8, 1982	First Amendment to Complaint filed by Point Landing, Inc., Point Landing Fuel, Inc., William S. Smith, Ruby M. Smith, Frank J. George, Brenda George and Dennis M. Rosenberg, et al in consolidated cases, respectively, C.A. No. 80-677, C.A. No. 81-590, C.A. No. 81-1996 and C.A. No. 81-4695.
May 16, 1983	Order and Reasons entered by District Court denying motions to dismiss filed by James Gourlay and Rudolf Wolff & Co., Ltd. in consolidated cases C.A. No. 80-677, C.A. No. 81-590, C.A. No. 81-1996 and C.A. No. 81-4695.
August 2, 1983	Motion for Reconsideration of Order For Dismissal of Defendant and Third Party Defendant Rudolf Wolff & Co., Ltd. filed in consolidated cases C.A. No. 80-677, C.A. No. 81-590, C.A. No. 81-1996 and C.A. No. 81-4695.

August 16, 1983	Motion for Reconsideration filed by James Gourlay in consolidated cases C.A. No. 80-677, C.A. No. 81-590, C.A. No. 81-1996 and C.A. No. 81-4695.
December 22, 1983	Minute Entry entered by District Court granting request by James Gourlay and Rudolf Wolff & Co., Ltd. for reconsideration of their respective motions to dismiss and ordering parties to file supplemental memorandum on issues presented.
June 11, 1984	Order and Reasons entered by District Court on Motions to Dismiss filed by James Gourlay and Rudolf Wolff & Co., Ltd.
June 15, 1984	Judgment entered by District Court in favor of Rudolf Wolff & Co., Ltd., and against Point Landing Corporation, Point Landing Fuel, Inc., Omni Capital International, Ltd., Omni Capital Corporation, and Northglen Capital Corporation dismissing all claims against Rudolf Wolff & Co., Ltd. and in favor of James Gourlay and against Omni Capital International, Ltd., Omni Capital Corporation, and Northglen Capital Corporation dismissing all claims against James Gourlay.
June 19, 1984	Notice of Appeal filed by Omni Capital International, Ltd., Northglen Capital Corporation, Michael Stern and Richard Friedberg of judgment entered June 15, 1984.
June 20, 1984	Notice of Appeal filed by Point Landing Corporation and Point Landing Fuel, Inc. of judgment entered June 15, 1984.

July 17, 1985	Order entered by the Court of Appeals for the Fifth Circuit referring matter for hearing on appeal to Court *en banc*.
July 25, 1986	Judgment of the Court of Appeals for the Fifth Circuit.
August 8, 1986	Corrected Judgment of the Court of Appeals for the Fifth Circuit that judgment of District Court be affirmed and cases remanded to the District Court. Mandate entered August 19, 1986.
October 22, 1986	Petition for Writ of Certiorari filed by Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, Richard Friedberg and Michael Stern.
January 27, 1987	Order of the United States Supreme Court granting Petition for Writ of Certiorari.

ORDER AND REASONS OF DISTRICT COURT ENTERED MAY 16, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

POINT LANDING, INC. and POINT LANDING FUEL CORP.	CIVIL ACTION NO. 80-677 consolidated with NOS. 81-590, 81-1996 and 81-4695
VS.	
OMNI CAPITAL, ET AL	

ORDER AND REASONS: MOTIONS TO DISMISS

These four consolidated cases all involve claims for damages based upon similar factual allegations and identical legal theories and seek similar relief. Each plaintiff allegedly invested in a "silver straddle" because of material representations allegedly made by agents of certain defendants at various meetings held in New Orleans in 1975 and 1976. The investment program involved the use of discretionary trading accounts to purchase and sell options and contracts in silver commodity futures traded on the London Metals Exchange, through brokers in London.

As a result of representations allegedly made to plaintiffs by certain defendants, favorable tax treatment was claimed on plaintiffs' federal income tax returns for several years. Subsequently, the Internal Revenue Service notified the plaintiffs that losses arising out of the silver straddle investment program would not be allowed.

Jurisdiction in each of the four cases is based upon alleged violations of:

(a) Sections 10b and 20 of the Securities Exchange Act of 1934 (15 USC 78j and 78t);

(b) S.E.C. Rule 10b-5 (17 C.F.R. 240.10b-5);

(c) Section 17(a) of the 1933 Securities Exchange Act (15 USC 77q(a));

(d) Section 4(b) of the Commodities Exchange Act (7 USC 6b and 17 C.F.R. 1.01 *et seq*);

(e) Section 9b of the Commodities Exchange Act (7 USC 13b);

(f) State law (pendent jurisdiction)

None of the four "sets" of plaintiffs has any relationship with the others. In the suits by plaintiffs Mr. and Mrs. Smith, Mr. and Mrs. George and Mr. and Mrs. Rosenberg, defendants are three corporations: Omni Capital International Ltd., Omni Capital Corporation, and Northglen Capital Corporation. Individual defendants are W. Lewis Ryder, who allegedly acted on behalf of Omni Capital International and Northglen, and three Omni corporate officers: Friedberg, Stern and Minsky. Also a defendant is a brokerage firm, Competex, S.A., now in liquidation, which allegdly performed the activities on the London Metals Exchange. In the fourth suit, by the two Point Landing corporations, defendants are the same, except that Ryder and Northglen are omitted and Rudolf Wolff and Co., a London brokerage firm, is substituted for Competex.

In the Smith, George, and Point Landing suits, the two Omni corporations filed third party complaints, as did Northglen in the Smith and George suits. In the Smith and George cases, the third party defendants are Wolff and Co., James Gourlay (who allegedly controlled Competex), and Main, Hurdman, an accounting firm. In the Point Landing suit, third party defendants are Gourlay,

and Main, Hurdman. Also, the Omni corporations cross-claimed against Wolff in the Point Landing suit, and the Omni corporations and Northglen cross-claimed against Competex in the Smith and George suits. In the Rosenberg suit, no incidental actions are pending.

For the following reasons, the court takes the action indicated hereafter with respect to the several motions which were submitted on a previous date and taken under advisement.

PERSONAL JURISDICTION

Motions seeking dismissal on the grounds of lack of personal jurisdiction were filed by Wolff Co., Gourlay, and Minsky.

When a party's allegations of *in personam* jurisdiction are challenged, the party asserting jurisdiction has the burden of showing some basis for its assertion of jurisdiction. *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483 (5th Cir. 1974); 5 Wright and Miller, Federal Practice and Procedure § 1351 at 565 (1969). In ruling upon these motions we consider depositions, affidavits and other written material submitted by the parties. See 5 Wright and Miller, Federal Practice and Procedure, *Id.* Where the district court chooses to decide the issue of personal jurisdiction on written submissions rather than on the basis of an evidentiary hearing, the party asserting jurisdiction is required only to present a prima facie case for personal jurisdiction. *Brown v. Flowers Industries, Inc.,* 688 F.2d 328 (5th Cir. 1982), *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899 (2d Cir. 1981).

FOREIGN DEFENDANTS: WOLFF CO. AND GOURLAY

Neither of these defendants is a "citizen" or "resident" of the United States; Gourlay is a citizen and resident of Great Britain, Wolff is a United Kingdom corporation not qualified to do business in the United States.

Claims are asserted against both these defendants under the two Securities Acts and the Commodities Act. We conclude that, while none of the three statutes deals specifically with the issue, as to all three statutes Congress intended for U. S. courts to exercise personal jurisdiction over foreign defendants not present in the United States to the limits of the due process clause of the Fifth Amendment. All three statutes contain broad provisions with respect to venue and service of process which support this conclusion. Securities Act: 15 U.S.C. 77v(a); Securities Exchange Act: 15 U.S.C. 78aa; Commodities Act: 7 U.S.C. 13a-1. As to the Securities Exchange Act, see *Leasco Data Processing Equipment Corporation v. Maxwell,* 468 F.2d 1326 (2d Cir. 1972).

Since the Congressional statutes support the exercise of personal jurisdiction to the extent of due process, we would need to look to Louisiana state statutes (such as "long-arm"), if at all, for methods of service of process only. No service of process issue is raised.

In a claim based upon a federal securities or commodities statute, whether the quality and nature of a foreign defendant's activities support a fair play and substantial justice determination (*International Shoe v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945) involves a consideration of all of defendant's

activities in the United States, not just in the forum state. *See Leasco, supra*, and *Mariash v. Morrill*, 496 F.2d 1138 (2nd cir. 1974).

Factors to be considered are whether the defendant was doing business in the United States, whether the defendant did an act in this country relating to the claim, and whether the defendant caused an effect in the United States by an act done elsewhere. See the Restatement (Second) of Conflict of Laws, Sections 27, 35, 36, 37, 45, 49 and 50.

GOURLAY

Gourlay is a citizen and resident of Great Britain. His participation in the silver straddle investment program consisted of discussions with representatives of Omni in an attempt to solicit business and, once that business was obtained, relaying business placed through Omni to Wolff, which executed the transactions. Gourlay had no personal contact with any of the plaintiffs in the main actions. He met with representatives of Omni in New York in the fall of 1974 to discuss commodities trading in general and a type of commodity transaction not involved herein. Additionally, there were several meetings in New York between Gourlay and representatives of Omni at which the concept of the silver straddle investment program was discussed. Those meetings were apparently of a preliminary nature, because later Omni representatives traveled to London to conduct a "due diligence" investigation of Wolff and the silver straddle investment program. The details of the investment program were apparently finalized in London.

The few meetings which occurred in New York between Omni representatives and Gourlay did not, standing alone, constitute the type of activity which is of such "a quality and nature" that it is "fair and reasonable" to require Gourlay to defend this suit in the United States. These meetings were not regular or continuous; standing alone they do not constitute "doing business" (on Gourlay's part) in the United States. *See Bersch v. Drexel Firestone Incorporated*, 519 F.2d 974 (2d Cir. 1975).

The second basis on which jurisdiction could be exercised over Gourlay is if he had done an act in the United States which caused injury to the plaintiffs. See the Restatement (Second) on Conflict of Laws, § 36. The New York meetings cannot be construed as an "act in the United States causing injury to the plaintiffs." As stated above, the New York meetings were of a preliminary nature. Plaintiffs have not shown a substantial connection between the discussions at the New York meetings and the injuries to themselves. It is not asserted, nor is there any evidence that the alleged misrepresentation by Gourlay occurred during one of the New York meetings. Without a showing of a substantial connection between the New York meetings and the alleged injuries, the relationship between them is too tenuous to conclude that the alleged injury arose as a result of the New York meetings.

We conclude, however, that the third basis for asserting jurisdiction, the "causes effects" approach of the Restatement (Second) of Conflict of Laws, Section 27, is a prima facie basis for *in personam* jurisdiction over Gourlay:

§ 37 Causing Effects in State by Act Done Elsewhere

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

In analyzing § 37, the court in *Leasco Data Processing Equipment, Inc., v. Maxwell, supra* at 1341, stated that the principle contained in § 37 "must be applied with caution particularly in an international context", and went on to suggest that in order to be sufficient to uphold jurisdiction, the effect within the state must occur "as a direct and foreseeable result of conduct outside the territory." Gourlay's actions in London met this test: they caused an effect in the United States which was a direct and foreseeable result thereof, and it is not unreasonable for this Court to exercise jurisdiction over the actor with respect thereto.

Gourlay was informed of the nature of the silver straddle transactions, the purposes thereof, and the Internal Revenue Service's requirements concerning the nature of the execution of the transactions. Gourlay placed the orders for the transactions with Wolff, and he knew that the transactions were to be executed on the London Metals Exchange, an exchange with which he was familiar. One basis for plaintiffs' claim is an allegation that Gourlay misrepresented the nature and operation of the London Metals Exchange. The nature and operation of the exchange was one reason given by the IRS for the disallowance of the anticipated tax benefits from the transactions. The "effect in the United States"

was the disallowance of the tax benefits, and that was a direct and foreseeable result of the manner in which the transactions were executed on the London Metals Exchange, due to the nature and operation of the exchange. Gourlay does not dispute the affidavit stating that he was aware of the purpose of the transactions. The documents establishes (sic) a prima facie case for personal jurisdiction.

WOLFF CO.

Rudolf Wolff and Company, Ltd., is a United Kingdom corporation with its principal place of business in London, England. Wolff is not qualified to do business in any state of the United States, nor does it maintain an office in the United States. Wolff has no employees, officers, telephone listing or registered agent in any state in this country. It does, however, have a bank account in New York. It is true that Rudolpf Wolff individually, apparently in his capacity as director for the company, holds membership in the New York Commodity Exchange, Inc., a U. S. based exchange. Even if this is considered as an activity of the corporate defendant, this without more does not constitute doing business on a regular basis. We have nothing to indicate that this membership had nothing to do with these transactions.

Wolff's participation in the silver straddle investment program, with respect to the Point Landing plaintiffs, was limited to executing purchases and sales of silver commodity options and futures transactions on the London Metals Exchange. After the completion of the transactions, Wolff mailed confirmation slips of the transaction into the United States. Clearly the mailing of such

confirmation slips into the United States is insufficient contact with this country to subject Wolff to suit in this country. The mailing of confirmation slips into this country cannot be seen as purposefully availing oneself of the benefits of the laws of the United States.

Neither would there be personal jurisdiction over Wolff based on its having directly caused an effect in the United States by an act done elsewhere, unless Wolff knew the nature and purpose of the silver straddle transactions as well as the Internal Revenue Service's requirements concerning the nature of the execution of the transaction. Plaintiffs' only contention in this respect is that Gourlay acted as Wolff's agent; his knowledge and actions were therefore Wolff's.

We have already found *in personam* jurisdiction over Gourlay based upon "causes effects". Therefore, if an agency relationship existed between Gourlay and Wolff, Wolff would also be subject to jurisdiction.

Both Wolff and Gourlay deny that an agency relationship existed between them at the time relevant to these transactions. However, there are several facts which are facially indicative of at least an apparent authority situation. Gourlay corresponded repeatedly on Wolff stationary, his office was located inside the Wolff offices, and his telephone service was routed through the Wolff switchboard. Additionally, Gourlay received his commission on the transactions from Wolff rather than directly from Omni.

The existence of apparent authority is generally determined based upon the acts of the principal rather than (those of) the alleged agent. *Lanier v. Alenco*, 459 F.2d

689 (5th Cir. 1972). Wolff knew or should have known of these regular activities by Gourlay, from which persons doing business with him would reasonably conclude that Gourlay was acting on behalf of Wolff. Thus based upon the documentary evidence before us at this time, there has been a prima facie showing of an apparent agency relationship, permitting the exercise of *in personam* jurisdiction over Wolff based on the acts of Gourlay.

For the foregoing reasons, we deny at this time Gourlay's and Wolff's motions to dismiss on the basis of lack of personal jurisdiction, without prejudice to their right to reassert this defense based upon the evidence at trial.

MINSKY

Minsky is a New York citizen. With respect to his motion to dismiss for lack of personal jurisdiction, he concedes that the nationwide service of process provisions of the securities and commodities statutes, if applicable, subject him to suit in any state of the United States. Plaintiffs allege that Minsky is liable because he aided and abetted all other defendants in the violation of the securities and the commodities statutes. Minsky asserts that because he is not an "aider and abettor" the court lacks jurisdiction over him. This is simply not a jurisdictional issue. If plaintiffs prove the facts upon which they base the claim that Minsky was an "aider and abettor", the court would clearly have jurisdiction over Minsky, based upon the activities in Louisiana of the agents/employees of the Omni corporations. If plaintiffs do not carry this burden of proof, a judgment on the merits in favor of Minsky will be the result. The court has jurisdiction to resolve the issues relating to Minsky's alleged liability; this motion is denied.

MOTIONS TO DISMISS: WOLFF AND CO., and GOURLAY

Wolff moves to dismiss (for failure to state a claim) the complaint of the two Point Landing corporations, the cross claims of the two Omni corporations in C.A. 80-677, and the third party complaints of the Omni corporations and Northglen Capital Corporation in C.A. 81-590 and C.A. 81-1996. Gourlay moves to dismiss for the same reasons the third party complaints against him by the two Omni corporations in Civil Actions No. 80-677, 81-590 and 81-1996.

The claims sought to be dismissed are brought under Sections 10b and 20 of the Securities Exchange Act of 1934, S.E.C. Rule 10b-5, and Section 17(a) of the 1933 Securities Act. Mover contends that there is no implied right of private action under Section 17(a) and that the transactions involved are commodities transactions not subject to the securities laws. The plaintiffs oppose part of the motion, contending that the transactions are properly classified as "securities" under the securities law; therefore, claims can be stated under Sections 10b and 20 and Rule 10b-5.

Plaintiffs initially opposed the dismissal of the Section 17(a) claim. However, at a prior hearing this opposition was abandoned, the Fifth Circuit having recently held that there is no implied private right of action under Section 17(a). *Landry v. All American Assurance Company*, 688 F.2d 381 (5th Cir. 1982). Thus, the motion is granted insofar as it seeks dismissal of the claims brought under Section 17(a), the only claims under the 1933 Securities Act.

With respect to the claims under Sections 10b and 20 and Rule 10b-5, the parties concede that the transactions involved were commodity futures transactions. For purposes of this analysis, we assume *arguendo* that the transactions were also securities transactions. To determine whether claims are stated under Section 10b and Rule 10b-5, we examine the relationship between the laws regulating commodities transactions and those governing securities transactions.

The Commodities Exchange Act (7 USC 1 *et seq*) was amended in 1974 to provide for the establishment of the Commodities Futures Trading Commission and to vest the Commission with exclusive jurisdiction over "accounts, agreements . . . and transactions" involving commodities future markets. 7 USC 2 (1974) The issue is what if any claims under the two securities acts survive the enactment of the Commodities Act. Claims under the securities acts may be based entirely upon statute or upon regulations enacted pursuant to one of the securities statutes. Only the latter are involved in the instant action.

Blessed with no controlling precedent in this circuit, we adopt the reasoning of the decisions holding that, as to commodities which are also securities, the commodities act preempts the securities act with respect to regulations promulgated pursuant to the securities acts. Therefore, there can be no claim based upon such regulations. *See American Grain Association v. Canfield, Burch & Mancuso*, 530 F. Supp. 1339, 1346 (W.D. La. 1982) and cases cited therein.

Thus the commodities act is the only statute that provides a cause of action based upon a regulation when commodity futures are involved. The commodities act is

not the exclusive statute if there is a statutory (as distinguished from regulatory) cause of action under either of the two securities statutes.

Plaintiffs' claim under the Securities Exchange Act is based in part upon an alleged violation of 15 USC 78j, which prescribes only specific activity "in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe . . .". Since the Commodities Act preempted regulations under the Securities Exchange Act as to securities which are commodity futures, there can be no claim in this case under Sec. 10(b). Therefore, Wolff's and Gourlay's motions are granted insofar as they seek dismissal of claims arising under Section 10b and Rule 10b-5.

The final claim which Wolff and Gourlay seek to dismiss is that arising under Section 20 of the Securities Exchange Act (15 USC 78t). Because the liability it creates is entirely vicarious in nature, we grant this part of the motions.

Section 20 makes it clear that, for one to be liable as a "controlling person", there must be a "person liable under any provisions of this chapter or of any rule or regulation thereunder" who is controlled. Here it is alleged that Omni International is the controlled entity. However, the only claims asserted against Omni are under Sections 10 and 17(a), pursuant to a regulation found in Chapter 2A of Title 15, as to which we have decided plaintiffs have no claim.

[Signature of District Court omitted in printing]

May 13, 1983

MINUTE ENTRY ENTERED BY DISTRICT COURT ON DECEMBER 22, 1983

[Caption omitted in printing]

MINUTE ENTRY

The motion for reconsideration of order for dismissal filed on behalf of defendant and third-party defendant Rudolf Wolff & Co. ("Wolff") and the motion for reconsideration filed on behalf of third party defendant James Gourlay were previously taken under advisement on memoranda.

On May 13, 1983, this court denied motions to dismiss for lack of personal jurisdiction filed on behalf of Wolff and Gourlay, among others. Motions to dismiss for failure to state a claim under the two securities acts were granted, on the grounds that, "as to commodities that are also securities, the commodities act preempts the securities act with respect to regulations promulgated pursuant to the securities acts." Wolff and Gourlay now ask the court to reconsider their motions to dismiss based upon lack of personal jurisdiction and to dismiss the claims against them for failure to state a claim under the Commodities Exchange Act ("CEA").

The recent Fifth Circuit of *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983), may relate to the issues involved in the motions to dismiss for lack of jurisdiction. The *DeMelo* decision may prompt reevaluation of our earlier view that the question of amenability to personal jurisdiction is based upon the totality of a defendant's activities in the United States. *DeMelo* may require us to consider whether a Louisiana court could have asserted personal jurisdiction under the state long arm statute

where, as here, the federal statute under which the action is brought is silent as to service of process. Assuming, *arguendo*, that this case is before us only on claims brought under the CEA, the jurisdiction of this court is based on 28 USC § 1337. Although § 6c of the CEA (1974), 7 USC § 13a-1, provides for nationwide venue and service of process, that provision is inapplicable to private causes of action. Since 28 USC § 1337 is silent as to service of process, under *DeMelo* personal jurisdiction over Wolff and Gourlay may be lacking unless based upon activities in Louisiana, as provided in the Louisiana long arm statute, La. R.S. 13:3201 et seq. The parties have not submitted briefs which address this question or the question of personal jurisdiction under the state long arm statute.

Insofar as the motions seek a dismissal of claims under the CEA, we first note that the CEA seems to apply to this case. However, we note in passing that, if the CEA does not govern the actions alleged, our earlier reasoning that the causes of action under the securities acts are preempted is inapplicable. To the extent that the discretionary trading accounts involved in this case fall outside the reach of the CEA, the securities acts and the regulations promulgated thereunder are simply not preempted. It is also worth noting, as Wolff observes in memoranda, that the jurisdictional provisions of the securities acts, unlike 28 USC § 1337, do provide for nationwide service of process and venue.

For the foregoing reasons, the motions are granted insofar as they seek reconsideration of the denial of prior motions to dismiss for lack of personal jurisdiction, which

motions will be considered resubmitted (on memoranda only) upon receipt of supplemental memoranda. Counsel shall submit such supplemental memoranda no later than February 6, 1984.

After consideration of the memoranda with respect to the motions to dismiss for failure to state a claim under the CEA, the motions are denied.

[Signature of District Court omitted in printing]

December 21, 1983

ORDER AND REASONS ENTERED BY DISTRICT COURT ON JUNE 11, 1984

[Caption omitted in printing]

ORDER AND REASONS

On May 13, 1983, motions to dismiss for lack of personal jurisdiction filed on behalf of Wolff, Gourlay, and others were denied. By minute entry dated December 21, 1983, motions by Wolff and Gourlay for reconsideration of the motions to dismiss for lack of personal jurisdiction were granted. Counsel were directed to submit supplemental memoranda addressing the question of personal jurisdiction under the state long-arm statute, particularly in light of the Fifth Circuit decision in *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983). Those memoranda have now been submitted. For the following reasons, the motions by Wolff and Gourlay are granted.

Parties adverse to movers make an interesting and indeed persuasive argument that *DeMelo* has no application to this entirely federal question case. However, we read *DeMelo* as controlling: unless jurisdiction can be asserted under the Louisiana long-arm statute, there is no personal jurisdiction over Wolff or Gourlay.

In our original *Order and Reasons* last May, we noted that there were very few if any activities in Louisiana by either mover. Applying a test of total activity in the United States (which *DeMelo* teaches was erroneous), we held that Wolff and Gourlay were subject to personal jurisdiction solely on a "causes effects" basis. The sole "causes effects" provision in the Louisiana long-arm statute applies only to a defendant who "regularly does or solicits business, or engages in any other persistent course

of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state." La. R.S. 13:3201(d). That provision is clearly not applicable.

Since the terms of the Louisiana long-arm statute are not met, a due process analysis is unnecessary. However, restricting our inquiry (as *DeMelo* directs) to Louisiana activity, we observe that even if the Louisiana statute were applicable by its terms, due process considerations would require us to grant the motions under consideration.

We expressly determine that there is no just reason for delay and direct entry of a final judgment dismissing all claims against Wolff and Gourlay. Fed. R. Civ. P. 54(b).

[Signature of District Court omitted in printing]

June 11, 1984

JUDGMENT OF DISTRICT COURT ENTERED JUNE 15, 1984

[Caption omitted in printing]

JUDGMENT

Considering the court's Order and Reasons filed herein dated June 11, 1984;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant and third-party defendant, Rudolf Wolff & Co., Ltd., and against Point Landing, Inc., Point Landing Fuel Corporation, Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, dismissing all claims against Rudolf Wolff & Co., Ltd., with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third-party defendant, James Gourlay, and against third-party plaintiffs, Omni Capital International, Ltd., Omni Capital Corporation, and Northglen Capital Corporation, dismissing all claims against James Gourlay, with costs.

The court determines that there is no just reason for delay and expressly designates this Judgment to be final judgment of this Court under Rule 54(b).

New Orleans, Louisiana, this 15th day of June, 1984.

[Signature of District Court omitted in printing]

ORDER DATED JULY 17, 1985, ENTERED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT REFERRING HEARING ON APPEAL TO COURT EN BANC

[Caption omitted in printing]

(July 17, 1985)

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.

BY THE COURT:

The Court on its own motion having determined to consider this cause en banc,

IT IS ORDERED that the submission of this cause to a panel of Judges Wisdom, Williams and Hill on March 5, 1985, is hereby vacated, and the cause shall be heard en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, AS CORRECTED AUGUST 8, 1986

[Caption omitted in printing]

United States Court of Appeals,
Fifth Circuit

July 25, 1986
As corrected August 8, 1986

Appeals from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, and WISDOM, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.*

PER CURIAM:

This appeal presents two important issues. First, does the Commodity Exchange Act ("CEA") provide an exclusive cause of action arising out of the commodities futures transactions the plaintiffs engaged in here, pre-empting claims under federal securities laws? Our answer must be "YES". The second question arises because of the absence of any provision in the CEA for nationwide service of process such as that which is explicitly stated in the Securities Exchange Act of 1934 ("1934 Act"). In

* Due to his death on March 27, 1986, Judge Albert Tate, Jr. did not participate in this decision.

this federal question case must personal jurisdiction[1] be obtained in accordance with Federal Rule of Civil Procedure 4(e), by applying the long-arm statute of the state in which the district court sits? Or may a defendant's contacts throughout the country be aggregated to permit jurisdiction to be asserted over a defendant who could not be reached by the state's long-arm statute? The district court applied Rule 4(e) and dismissed the claims against two of the defendants for lack of personal jurisdiction. We affirm the judgment of the district court.

I.

The plaintiffs in these four consolidated actions are two Louisiana corporations, Point Landing, Inc. and Point Landing Fuel Corporation (collectively referred to as "Point Landing"), and individual investors William and Ruby Smith ("Smith"), Frank and Brenda George ("George"), and Dennis and Joan Rosenberg ("Rosenberg"). In the Point Landing action the defendants are: two New York corporations, Omni Capital International, Ltd. and Omni Capital Corporation (collectively referred to as "Omni"); their broker, Rudolf Wolff & Co. Ltd. ("Wolff"), a British corporation; and certain officers or employees of Omni, Richard Friedburg, Michael Stern, and Barry Minsky. Omni impleaded James Gourlay, Wolff's

1. "The concept of personal jurisdiction comprises two distinct components: amenability to jurisdiction and service of process. Amenability to jurisdiction means that a defendant is within the substantive reach of a forum's jurisdiction under applicable law. Service of process is simply the physical means by which that jurisdiction is asserted." *DeMelo v. Toche Marine, Inc.*, 5 Cir.1983, 711 F.2d 1260, 1264 (citations omitted).

representative, and Main, Hurdman, an accounting firm. In the Smith, George, and Rosenberg suits, the defendants are Omni, Northglen Capital Corporation ("Northglen"), Richard Friedburg, Michael Stern, Barry Minsky, and Competex, S.A., a now defunct Swiss company that has not appeared in the case. In the Smith and George suits, Omni and Northglen filed third-party complaints against Wolff, Gourlay and Main Hurdman. Wolff had no relationship with Smith, George, or Rosenberg and is not a defendant in their actions.[2]

The complaint alleges that the defendants, by making misrepresentations concerning their "investment program", fraudulently induced the plaintiffs to invest in silver straddle[3] commodity futures traded on the London Metals Exchange through discretionary trading accounts. Wolff and Competex handled these trades. Earlier, Wolff had approached Omni in New York to solicit Omni's business through Gourlay, a former director who acted as an agent for Wolff. Wolff billed Omni over 105,000 British pounds for commissions, part of which went to Gourlay.

The plaintiffs contend that Omni had meetings and did extensive advertising in which Omni represented that

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2. In short, neither Wolff nor Gourlay is a party in the Rosenberg action; Wolff is a defendant in the Point Landing action and a third-party defendant in the other two actions. Gourlay is a third-party defendant in three actions.

3. A straddle is the simultaneous purchase and sale of futures contracts, deliveries to be made in different months. Investors have attempted to use straddles in stock options or commodities to generate capital gains and ordinary losses. *Commodity Exchange, Inc. v. CFTC*, 543 F.Supp. 1340 [1980-1982] Comm.Fut.L.Rep. (CCH) ¶ 21,445 (S.D.N.Y.1982); 1 P. Johnson, *Commodities Regulation* § 1.15, at 48, 49 (1982).

participation in its investment program would entitle the investors to federal income tax deductions on losses incurred, in addition to future profits. Unfortunately for the investors, the Internal Revenue Service disallowed the plaintiffs' deductions on the ground that the trades in London were not "bona fide, arm's length" transactions. The IRS concluded that the London Metals Exchange is not a public market and that its members were setting prices. All parties agree that the transactions involved "commodities" for purposes of federal law; plaintiffs allege, but Omni denies, that these were also "securities".

The original complaints allege violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), §§ 10b and 20 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78t, Rule 10b-5, 17 C.F.R. § 240.10b-5, and the Louisiana Blue Sky law. The district court dismissed the plaintiffs' claims under the 1933 Act and under § 20 of the 1934 Act. The plaintiffs do not appeal from those dismissals.

In *Rivers v. Rosenthal & Co.*, 5 Cir. 1980, 634 F.2d 774, *vacated*, 1982, 456 U.S. 968, 102 S.Ct. 2228, 72 L.Ed.2d 841, this Court held that the CEA affords no implied private right of action. The plaintiffs' original complaints therefore allege no violations of federal commodities law. While these actions were pending, the Supreme Court recognized an implied private right of action under the CEA and vacated our judgment in *Rivers*. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 1982, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182. In the light of *Curran*, the plaintiffs

amended their complaints to allege violations of §§ 4b and 9(b) of the CEA, 7 U.S.C. §§ 6b, 13(b).[4]

Wolff and Gourlay contest the court's jurisdiction over their persons. The district court initially considered the defendants' contacts with the United States as a whole and found that the aggregate contacts were sufficient to subject both parties to the court's jurisdiction.

Shortly thereafter this Court issued its opinion in *DeMelo v. Toche Marine, Inc.*, 5th Cir. 1983, 711 F.2d 1260. In *DeMelo* the question was: "[W]hat standard of amenability [to personal jurisdiction] should apply when the plaintiff's claims are founded in part upon federal question jurisdiction, but service is effected under a state long-arm statute?" 711 F.2d at 1265. The Court noted that the two most recent Fifth Circuit cases on this point, *Lapeyrouse v. Texaco*, 5 Cir. 1982, 693 F.2d 581, and *Burstein v. State Bar of California*, 5 Cir. 1982, 693 F.2d 511, "decided only three days apart, give different answers".[5] 711

4. Omni never amended its third party complaints to add the commodities law counts. Third party defendants may, however, move to dismiss the primary complaint for failure to state a claim. Fed.R.Civ.P. 14(a).

Transactions on the London Metal Exchange have been held outside the scope of § 4b of the CEA. *Kleinberg v. Bear Stearns & Co.*, [9184-86] Comm.Fut.L.Rep. (CCH) ¶ 22,613 (S.D.N.Y. 1985); *de Atucha v. Commodity Exchange, Inc.*, S.D. N.Y.1985, 608 F.Supp. 510. The plaintiffs' claims may however be cognizable under § 4c(b) of the Act, 7 U.S.C. § 6c(b) and Regulation 32.9, 17 C.F.R. § 32.9, or under Regulation 30.02, 17 C.F.R. § 30.02.

5. *Lapeyrouse* relied on *Terry v. Raymond International, Inc.*, 5 Cir.1981, 658 F.2d 398 and *Lone Star Package Car Co. v. Baltimore & Ohio R.R. Co.*, 5 Cir.1954, 212 F.2d 147. *Burstein* distinguished *Terry* and *Lone Star*.

F.2d at 1265. Writing for the *DeMelo* Court, Judge Gee chose to follow *Burstein*, holding that "when a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is therefore utilized to serve an out-of-state defendant, Rule 4(e) requires that the state's standard of amenability to jurisdiction apply". *Id.* at 1266.

Wolff and Gourlay, relying on *DeMelo*, then renewed their objections to the court's personal jurisdiction. The district court held that: (1) the CEA preempts private actions under § 10(b) of the 1934 Act and Rule 10b-5; (2) the CEA does not expressly or impliedly authorize nationwide service of process in private actions; (3) *DeMelo* requires an application of the Louisiana long-arm statute in private actions under the CEA; and (4) neither Wolff nor Gourlay is subject to the jurisdiction of Louisiana state courts. The court therefore dismissed the claims against Wolff and Gourlay for lack of personal jurisdiction. Because our opinions on the issue of personal jurisdiction in federal question cases, "[l]ike a Tower of Babel . . . spoke in irreconciliable voices", *DeMelo*, 711 F.2d at 1268, the Court decided to hear this appeal en banc without an opinion by the panel to which the consolidated appeals were assigned.

We agree with the district court. The plaintiffs can recover, if at all, only under the CEA. Absent a rule or statute to the contrary, Federal Rule of Civil Procedure 4(e) permits a federal court to exercise jurisdiction over only those defendants who are subject to the jurisdiction of courts of the state in which the court sits. Because the plaintiffs do not challenge the district court's findings

that Wolff and Gourlay are not subject to the jurisdiction of Louisiana state courts under that state's long-arm statute, we affirm the dismissal of all claims against Wolff and Gourlay.

II.

We would not need to decide the question of amenability to personal jurisdiction by service under the Louisiana long-arm statute, *if* the commodity trades here were governed by the securities laws. Wolff and Gourlay would then be subject to the court's jurisdiction under § 27 of the 1934 Act, which permits service of process "wherever the defendant may be found". 15 U.S.C. § 78aa. Federal courts may exercise personal jurisdiction under § 27 of the 1934 Act to the limits of due process. *Leasco Data Processing Equipment Corp. v. Maxwell*, 2 Cir. 1972, 468 F.2d 1326, 1340 (Friendly, J.).

A.

Until 1974 the CEA applied only to transactions in certain agricultural commodities. *See* 7 U.S.C. § 2 (1970). Courts disagreed over which commodities transactions were covered by the securities statutes, and some transactions fell into a gap between federal securities and commodities laws.

The Commodity Futures Trading Commission Act of 1974 ("CFTA"), Pub.L. No. 93-463, 88 Stat. 1389, "the first complete overhaul of the Commodity Exchange Act since its inception", provides a "comprehensive regulatory structure". H.R.Rep. No. 975, 93d Cong., 2d Sess. 1. Congress intended the 1974 amendments to "fill all regulatory gaps" while "avoid[ing] unnecessary, overlapping

and duplicative regulation." 120 Cong. Rec. H34736 (Oct. 9, 1974) (remarks of House Agriculture Committee Chairman Robert Poage); 120 Cong. Rec. S34997 (Oct. 10, 1974) (remarks of Senate Agriculture Committee Chairman Herman Talmadge).

[1] Section 2(a)(1)(A), set out in the margin, is the critical provision of the CFTA.[6] The statute confers on the Commodities Futures Trading Commission ("CFTC") exlusive jurisdiction over "accounts . . . involving contract of sale of a commodity for future delivery traded or executed on a contract market designated pursuant to § 7 of this title or any other board of trade, exchange, or market". The London Metals Exchange, although not a designated exchange, is a "board of trade, exchange or market" within the meaning of § 2. This Court has held that the CFTC has regulatory authority over trading in "London options". *CFTC v. Miller*, 5 Cir. 1978, 570 F.2d 1296, 1299.

[2] The legislative history of § 2 indicates that the CFTC has exclusive jurisdiction over the transactions at

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6. Section 2(a)(1)(A) provides:

> [T]he Commission shall have exclusive jurisdiction, except to the extent otherwise provided in § 2(a) of this title with respect to accounts, agreements . . . and transactions involving contract of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to § 7 of this title or any other board of trade, exchange, or market. . . . [N]othing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.

7 U.S.C. § 2.

issue. Representative Poage, Chairman of the House Agriculture Committee, remarked from the House floor:

> I wish to emphasize that the words "any other board of trade, exchange or market" were included . . . only for the purpose of giving the Commodity Futures Trading Commission jurisdiction over future contracts purchased and sold in the United States and executed on a foreign board of trade, exchange, or market. This grant of exclusive jurisdiction is not to be construed as preempting the jurisdiction of the Securities and Exchange Commission over securities . . . traded on any national securities exchange or any other U. S. securities market.

120 Cong.Rec. H34, 737 (1974). The Supreme Court has concluded that Section 2 gives the CFTC "exclusive jurisdiction over commodity futures trading. The purpose of the exclusive-jurisdiction provision in the bill passed by the House was to separate the functions of the Commission from those of the Securities and Exchange Commission and other regulatory agencies." *Curran*, 456 U.S. at 386, 102 S.Ct. at 1843. *See also* Markham, *Regulation of International Transactions Under the Commodity Exchange Act*, 48 Fordham L.Rev. 129, 133 (1979).

[3] Point Landing argues that the SEC retained jurisdiction over the transactions under the saving clause of § 2:

> [E]xcept as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.

As originally passed in the House, the bill provided that "nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission". H.R. 1131, 93d Cong., 2d Sess. § 201 (1974), U.S. Code Cong. & Admin.News 1974, p. 5843.[7] The Senate added the phrase "except as hereinabove provided" to ensure that "the [CFTC's exclusive] jurisdiction, where applicable, supersedes state as well as federal agencies". S.Rep. No. 1131, 93d Cong. 2d Sess. 6 (1974), U.S.Code Cong. & Admin. News 1974, p. 5848. The Senate version was adopted by the Conference Committee and enacted into law. According to the Conference Report, § 2 (a)(1)(A) "preempt[s] the field insofar as futures regulation is concerned". H.Conf.Rep. No. 1383, 93d Cong. 2d Sess. (1974).

Congress has not altered the CFTC's jurisdiction over discretionary commodity accounts since 1974. The Senate Agriculture Committee has reported that "[t]he basic conclusion reached in 1974 that there should be a single regulatory agency responsible for futures trading is as valid now as it was then". S.Rep. No. 850, 95th Cong. 2d Sess. 22 (1978), U.S. Code Cong. & Admin.News 1978, pp. 2087, 2110. A report accompanying the House version of the 1982 amendments to the CEA explained that "the [CFTC] would continue to have exclusive jurisdiction over foreign

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7. The report accompanying the House bill stated that the CFTC would have exclusive jurisdiction over commodities futures traded on a contract market. H.R.Rep. No. 975, 93rd Cong. 2nd Sess. 28 (1974).

futures transactions traded in the United States". H.R. Rep. No. 97-565(I), 97th Cong. 2d Sess. (1982), U.S.Code Cong. & Admin. News 1982, pp. 3871, 3953.

B.

The plaintiffs contend that even if the SEC lacks jurisdiction to regulate the transactions at issue, the courts may grant relief based on securities laws and regulations. Courts faced with this question have reached three different results.

(1) Some courts and commentators, many but not all writing before 1982, adopt the plaintiffs' position. *Peavey Co. v. Mitchell*, W.D.Okla., 1983 [1983-84] Fed. Sec. L.Rep. (CCH) ¶ 99,593; *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, D.Nev.1980, 492 F.Supp. 1345; Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J Corp.L. 217, 310 (1976); Note, *The Continued Availability of Private Actions for Fraud Under the Securities Statutes in Commodity-Security Transactions*, 22 B.C.L. Rev. 335 (1981). The Court of Appeals for the Ninth Circuit has approved this result in dictum. *Mordaunt v. Incomco*, 9 Cir. 1982, 686 F.2d 815, *cert. denied*, — U.S. —, 105 S.Ct. 801, 83 L.Ed.2d 793 (1985). *Mordaunt* cites the Supreme Court's *Curran* opinion as authority for the proposition that the CEA does not preempt private actions under the securities laws. 686 F.2d at 816. The *Curran* opinion, however, does not address the preemption of private securities actions. The Court found that an implied right of action under the CEA survived the 1974 amendments. Because the 1974 amendments dramatically expanded the scope of the commodities laws to avoid "overlapping and duplicative" cover-

age, it appears to us that *Curran* does not support the proposition for which it is cited in *Mordaunt*. *See* T. Russo, *Regulation of the Commodities, Futures, and Options Markets* § 10.20, at 10-54 (1983).

(2) Other courts, including the district court in this case, have concluded that plaintiffs may recover under "self-executing" sections of the securities acts but not under § 10(b) of the 1934 Act or under other sections that proscribe activities contravening SEC regulations. *American Grain Assoc. v. Canfield, Burch & Mancuso*, W.D.La.1982, 530 F.Supp. 1339; *Westlake v. Abrams*, N.D. Ga.1980, 504 F.Supp. 337, 345.

(3) Still other courts hold that plaintiffs may not recover under any securities statute or regulation. *Mallen v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, N.D. Ga.1985, 605 F.Supp. 1105, 1114; *Bartels v. International Commodities Corp.*, D.Conn.1977, 435 F.Supp. 865, 869; *Fairchild, Arabatzis & Smith, Inc. v. Prometco Co.*, S.D. N.Y.1979, 470 F.Supp. 610, 614.

[4] We hold that the CEA affords plaintiffs their exclusive remedy.[8] Any other result would frustrate the

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8. The SEC, in an amicus brief submitted at the Court's request, agrees that the CFTC has exclusive regulatory jurisdiction over individual discretionary accounts, by virtue of amendments to the CEA enacted in the Commodities Futures Trading Commission Act of 1974. "[W]here the broker and manager of a discretionary commodity account receive commissions based on trade prices rather than share in the customer's profits or losses, the account is not a security within the meaning of the federal securities laws." SEC brf. at 2.

The CFTC, in its amicus brief, which was also requested by the Court, concludes that both the plain language and the legislative history of the 1974 amendments to the Act

(Continued on following page)

intent of Congress to preempt the field insofar as futures regulation is concerned. Congress intended the 1974 amendments to create a uniform regulatory scheme. Private actions under the securities laws might engraft policies and standards inconsistent with those developed under the CEA. We find, moreover, no reason to rely on securities laws when the CEA now affords a full range of remedies, including an express private right of action. *See T.Ruso,* § 10.20, at 10-58 to 59.

The securities acts contain broad and flexible concepts such as "manipulative acts and practices" and "just and equitable principles of trade". 15 U.S.C. § 78f-(b)5. The CEA permits the CFTC to designate a contract market in a particular commodity only if the new futures contract "will not be contrary to the public interest." 7 U.S.C. § 7(g).

> These fluid concepts not only require the continual exercise of judgment and discretion, but, to provide effective regulation, they must be administered on a relatively consistent and uniform basis. It is rea-

(Continued from previous page)

make clear that Congress intended Section 2(a)(1) (now Section 2(a)(1)(A) of the Act, 7 U.S.C. § 2, to preclude application of federal securities laws to all transactions involving futures and options on futures including foreign-exchange traded futures contracts, the options on such contracts, and the discretionary commodity accounts that are involved in this case.

It is unnecessary for the Court to decide whether the accounts in question are securities, since in any event the CEA is preemptive.

The Court appreciates the efforts expended by the SEC and the CFTC and the excellence of their briefs.

> sonable to assume that Congress, having created a regulatory agency under the same statute, intends for that agency to exercise the requisite judgment and to provide the needed uniformity. . . . Conversely, once Congress has directed the agency not to formulate regulatory policy with respect to a particular activity . . . no public benefit can be discerned from allowing private actions for private gain, which may evolve new policies or standards at variance with the congressional intent, under the preempted agency's governing statute.

Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy,* 29 Vand.L.Rev. 35-36 (1976).

The plaintiffs appeal only the dismissal of their claim under § 10(b) of the 1934 Act. We have, therefore, no occasion to hold that the CEA also preempts actions under "self-executing" sections of the securities acts.

III.

On first considering the subject of the amendability of an out-of-state defendant, especially an alien defendant, to the personal jurisdiction of a feedral court hearing a federal question case, one's natural reaction does not necessarily coincide with the conclusions one may be forced to reach in the light of the decided cases and commentary. It may seem anomalous to tie personal jurisdiction in a federal question case to the long-arm statute of the state in which the federal court sits. In a diversity case where the plaintiff asserts a local claim, a federal court using a state long-arm statute, as required by Rule 4(e), is bound by the limits of the fourteenth amendment. The court must make certain that the forum state does not

unduly encroach on the interests of a sister state or of the nation. In a federal question case, however, where a federal court is adjudicating a federal claim involving a federal statute, concern for limiting the reach of a state is irrelevant. The court determines rights and liabilities under a uniform, national law. If fairness or due process is an issue, it is the due process standard of the fifth amendment, not the fourteenth amendment, that must be met. A heavy weight of authority, however, accepts the anomaly. See Note, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Cases,* 70 Calif.L.Rev. 686 (1982).

A.

[5] To start at the logical beginning, the unmalleable principle of law that is unyielding to legal blandishments is that federal courts may exercise only so much of their Article III jurisdiction as they are granted by Congress. They must ground their personal jurisdiction on a federal statute or rule. "As courts of limited jurisdiction, the federal courts possess no warrant to create jurisdictional law of their own." *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 1982, 456 U.S. 694, 711, 102 S.Ct. 2099, 2109, 72 L.Ed.2d 492 (Powell, J., concurring). *See also Burstein,* 693 F.2d at 514; *Rebozo v. Washington Post Co.,* 5 Cir.1975, 515 F.2d 1208, 1211; *Wells Fargo & Co. v. Wells Fargo Express Co.,* 9 Cir.1977, 556 F.2d 406, 414 (collecting authorities).

[6] In rare instances there are gaps in the law enabling a federal court to fashion federal common law. We decline to do so here because of the nature of personal

jurisdiction. That federal courts should determine their own personal jurisdiction is a proposition fundamentally at odds with our government of separated powers. The Supreme Court typically has approved the creation of federal common law only when there is some basis for the conclusion that Congress would have adopted the rule fashioned by the courts if it had considered the matter, or at least that Congress would have left the choice to the courts. *See, e.g., United States v. Little Lake Misere Land Co.,* 1973, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187; *Clearfield Trust Co. v. United States,* 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; *see generally* M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 79-107 (1980); Friendly, *In Praise of* Erie—*And of the New Federal Common Law,* 39 N.Y.U.L. Rev. 383 (1964). We find no basis for either conclusion in this case.

B.

[7] The 1974 amendments to the CEA provide for actions (1) by the CFTC (formerly the Commodities Exchange Commission), (2) by state attorneys general, and (3) by private parties seeking to enforce a CFTC ruling in their favor. 7 U.S.C. §§ 13a-1, 13a-2, 18(d). To make these actions effective, the sections referred to expressly provide for nationwide service of process. In 1982 Congress provided for private actions under the CEA, 7 U.S.C. § 25, but was silent as to service of process. Point Landing argues that Congress intended to allow nationwide service of process in private actions because it did so in the other types of actions authorized under the CEA. There is no basis for this argument. On the contrary, the clear language of §§ 13a-1, 13a-2 and 18(d) demonstrates

that Congress knows how to provide for nationwide service of process. The more likely inference to draw from the congressional silence is that Congress omitted that language from § 25 because it did not intend to permit nationwide service of process. Even though private actions are a "significant enforcement tool", *Curran*, 456 U.S. at 394, 102 S.Ct. at 1847, there is a rational governmental basis for limiting service of process in private suits while giving wide powers to those government regulatory bodies charged with primary responsibility for developing and enforcing regulatory policy. Indeed, a House Committee reported that it looks to vigorous enforcement by the CFTC, "so it does not become necessary to rely on private litigants as a policeman of the Commodities Exchange Act". H.R.Rep. No. 97-565(I) at 57, U.S.Code Cong. & Admin.News 1982, at 3906.

Since the CEA is silent on the subject of process, authority for service and personal jurisdiction must be found in the Rules.

C.

Professor Moore comments on the general rules provision governing service of process and personal jurisdiction:

> No court has unlimited authority to issue original process. In regard to state courts, the basic limitation on service of original process is the notion that a state may only exercise jurisdiction over a res that is within its borders or over a person who has been personally served within the state, or who has had sufficient contact with the state so that in personam service may be made beyond its borders consistent with due process.

> Similarly, the federal district courts may only issue process for service within the territorial limits validly authorized by a federal statute or the Federal Rules.

2 J. Moore, J. Lucas, H. Fink & C. Thompson, Moore's Federal Practice ¶ 4.02[3] at 4-45 to 46 (footnotes omitted).

"Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained." *Insurance Corp. of Ireland*, 456 U.S. at 715 n. 6, 102 S.Ct. at 2111 n. 6 (Powell, J., concurring). Rule 4 therefore has been characterized as a "jurisdictional provision." (Statement by Mr. Justice Black and Mr. Justice Douglas, 1963, 374 U.S. 865, 869, dissenting from adoption of amendments to the Federal Rules of Civil Procedure).

Rule 4(f) provides in part:

> (f) *Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.

Rule 4(e) provides:

> (e) *Summons: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated

> in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made *under the circumstances and in the manner* prescribed in the statute or rule. (emphasis added)

Rule 4(e) therefore permits service "under the circumstances . . . prescribed" by a statute or rule of the state in which the district courts sits. (No question is raised here by the parties as to the "manner" of service.) The critical phrase "under the circumstances" was added to the rule in 1963. This occurred several years after our decision in *Lone Star Package Car Co. v. Baltimore & Ohio Railroad*, 5 Cir.1954, 212 F.2d 147.

In *Lone Star* this Court made the broad statement that whether the state long-arm statute asserts jurisdiction over a defendant sought to be joined in suit is irrelevant "where the power of the federal court . . . can be independently sustained . . . on the ground that the matter in controversy arises under the Constitution, laws or treaties of the United States". 212 F.2d at 153-54. *See also Terry v. Raymond International, Inc.*, 5 Cir.1981, 658 F.2d 398, 401, *cert. denied*, 1982, 456 U.S. 928, 102 S.Ct. 1975, 72 L.Ed.2d 443, in which this Court declared that in a federal question case the "contours of amenability . . . are more fluid".[9]

9. Both these statements are relied on in *Lapeyrouse v. Texaco, Inc.*, 5 Cir.1982, 693 F.2d 581, 585.

In *Lapeyrouse v. Texaco, Inc.*, 5 Cir. 1982, 693 F.2d 581, Judge Wililams, for the Court, citing *Lone Star* and *Terry*, found that the "sole test for amenability" to personal jurisdiction in a federal question case is the due process clause of the fifth amendment.[10] The opinion states:

> [T]he Supreme Court's consideration of various factors as relevant to a determination of the fairness of exerting jurisdiction take on new meaning in the context of a federal forum interpreting its own laws. Thus, while we are aided by the constructions provided the due process clause under the Fourteenth Amendment in determining whether ***in personam*** jurisdiction may be asserted, we must give weight to the differences occasioned by the federal nature of both the forum and claim in determining whether the due process clause of the Fifth Amendment permits exercise of ***in personam*** jurisdiction in this case.

693 F.2d at 586 (footnote omitted).

In *Burstein v. State Bar of California*, 5 Cir.1982, 693 F.2d 511, in a thorough and perceptive analysis of Rule 4(e), Judge Randall, for the Court, concluded:

> While by its terms rule 4(d) might well apply to this case, it is clear that rule 4(e) is designed for use to obtain service on parties not resident within the forum state, and by negative implication it excludes rule 4(d) . . . .
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> . . . .
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> . . . The clear import of the "under the circumstances" language, at least where the assertion of

10. On the fifth amendment-fourteenth amendment due process point, see Fullerton *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw.U.L.Rev. 1 1984).

jurisdiction and not just the service of process depends on the state statute, is that a federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state court could also reach under it.

693 F.2d at 514 (citations omitted).

The opinion quotes Professors Wright and Miller:

> On balance, then, it would seem that state law always should govern amenability when a state statute is used pursuant to Rule 4(e). Although the opposite result has some appeal in that it permits effectuation of federal interests in a broader range of suits, it is inconsistent with the apparent intent of the draftsmen of Rule 4(e) to use state provisions for service in order to permit the federal courts in a state to hear those cases that could be brought in the state's own courts when a basis for asserting federal subject matter jurisdiction exists.[11]

W C. Wright & A. Miller, *Federal Practice & Procedure*, § 1075, at 313 (1969).

Judge Randall took pains to point out that *Lone Star* involved a diversity claim and in-state service. It therefore comes within Rule 4(d)(7) rather than Rule 4(e).

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11. Judge Randall added this footnote:

> The other leading commentator in the field takes the opposite position. J. Moore, J. Lucas, H. Fink, & C. Thompson, *Moore's Federal Practice* ¶ 4.41-1[1] at 4-424 (1982). Since the entire discussion of amenability under rule 4(e) consists of a reference to the discussion of amenability under rule 4(d), *id.* ¶ 4.24[7], with no explanation for the similarity in analysis and result despite the difference in language between the two rules, we find Wright & Miller more persuasive.

693 F.2d 511, 515, n. 5.

Rule 4(d)(7) requires service only "in the manner prescribed by the law of the state in which the district court is held"; it does not have the "under the circumstances" language of Rule 4(e).

In *DeMelo v. Toche Marine, Inc.*, 5 Cir. 1983, 711 F.2d 1260, the Court was confronted with the dilemma of choosing between *Burstein or Lapeyrouse*. Judge Gee, for the Court, "look[ed] to the Rule" and decided that the *Burstein* "exposition . . . is the more sound". 711 F.2d at 1266. "*Lone Star* was decided in 1954, long before the 1963 amendments to Rule 4 added the second sentence to Rule 4(e). . . . *Terry* discussed neither the 1963 amendments to Rule 4 nor any of the intervening federal question cases that had applied a state standard of amenability. . . . [R]elying solely upon the broad language in *Lone Star, Terry* applied a federal standard, treating the reach of the state long-arm statute as 'irrelevant'." 711 F.2d at 1268-69.

Most courts agree that Rule 4(e) incorporates the forum state's long-arm statute when the federal statute sued under does not authorize nationwide service of process. In *Max Daetwyler Corp. v. R. Meyer*, 3 Cir.1985, 762 F.2d 290, *cert. denied*, — U.S. —, 106 S.Ct. 383, 88 L.Ed.2d 336, the court recently addressed the issue before this Court: amendability to jurisdiction of an alien defendant in a federal question action when the defendant's contacts with the United States as a whole were sufficient to satisfy due process, but contacts with the forum state were insufficient. The court, per Garth, J., held that "in the absence of a governing federal statute providing for nationwide service of process, in personam jurisdiction may not rest upon an alien's aggregated national contacts,"

and the long-arm statute of the forum state must be applied. *Id.* at 291. The court declined the plaintiff's suggestion that it adopt a "national contacts theory," which asserts that "the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States." *Id.* at 293. The court noted that, although the national contacts theory might be constitutionally valid, Rule 4(e) was a limitation on the court's power. It interpreted Rule 4(e) as adopting "an incorporative approach requiring that both the assertion of [personal] jurisdiction and the service of process be gauged by state amenability standards". *Id.* at 295.

The court implied that if the national contacts theory is accepted, it in effect reads a nationwide service of process provision into all federal laws when an alien is a defendant. It recognized that although "the uniform administration of federal law might be enhanced were Congress to establish a general federal question competence statute, in the absence of such legislation, we are required to follow the incorporative provisions of Rule 4(e)". *Id.* at 296. The court stated that all but a "few" courts interpreted Rule 4(e) the same way. *Id.* at 297.

The court in *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty., Ltd.*, D.C.Cir.1981, 647 F.2d 200, concluded, in a trademark case, that in the absence of a federal statute authorizing nationwide service of process, under Rule 4(e) "we must look to the District of Columbia long-arm statute". *Id.* at 204. *Wells Fargo & Co. v. Wells Fargo Express*, 9 Cir. 1977, 556 F.2d 406, 418, rejected the national contacts theory because the Lanham Act did not grant federal courts broad service of process

powers. *See also Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 1 Cir.1984, 743 F.2d 947, 950 (Federal Rules of Civil Procedure and other congressional mandates limit exercise of personal jurisdiction in federal question cases).

The Court of Appeals for the Sixth Circuit has concluded that "a federal district court considering a case that arises under federal law is not subject to precisely the same due process limitations which restrict its reach in diversity cases". *Handley v. Indiana & Michigan Electric Co.*, 6 Cir. 1984, 732 F.2d 1265, 1272. The *Handley* court invoked the Kentucky long-arm statute, but nevertheless asserted jurisdiction over a defendant not subject to the jurisdiction of the Kentucky courts. The court reasoned that, since the Kentucky statute extends jurisdiction to the limit of the fourteenth amendment, federal courts in federal question cases may extend jurisdiction to the limits of the fifth amendment. We find no warrant in the language or history of Rule 4(e) for this result.

[8] In short, an "overwhelming majority of federal courts have held that, in the absence of specific provisions to the contrary, rule 4 adopts the state provisions on amenability to service and on manner of service". Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv.L. Rev. 470, 471 n. 6 (1981). Probably a majority of commentators agree that Rule 4(e) incorporates the forum state long-arm statute when the federal statute sued under does not provide for a nationwide service of process even though they may disagree with that conclusion as a matter of policy. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69

Va.L.Rev. 85 (1983); Von Mehren & Troutman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv.L.Rev. 1121, 1123 n. 6 (1966); Note, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 Calif.L.Rev. 686, 690 n. 24, 693 (1982) Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv.L.Rev. 470, 479-81 (1981); *see generally* Project, *Obtaining Personal Jurisdiction Over Alien Corporations—A Survey of U.S. Practice*, 9 Vand.J. Transnat'l L. 345 (1976).

There may be some appealing arguments for the notion of aggregating national contacts in federal cases where in any one forum there are not enough local contacts to justify use of a state long-arm statute for service of process and for personal jurisdiction to attach, although the aggregate of the national contacts are substantial. But we cannot blink the language of Rule 4(e). We cannot read the rule except as saying that absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits. *Lapeyrouse and Terry* are overruled to the extent that they differ from the views expressed in this opinion.

Neither Point Landing nor Omni disputes the court's findings that Wolff and Gourlay are not subject to the jurisdiction of the Louisiana courts under that state's long-arm statute.

The judgment of the district court is AFFIRMED. The case is remanded for further proceedings consistent with this opinion.

WISDOM, Circuit Judge, with whom Chief Judge CLARK, and Judges ALVIN B. RUBIN, POLITZ, JOHNSON, and JERRE S. WILLIAMS join, concurring in part and dissenting in part:

I respectfully dissent from Section III of the majority opinion. That section is an exercise in lawyering, not in judging. By focusing attention on the details of service of process, the majority lose sight of important questions of jurisdiction. In this federal question case, the effect of the majority's decision is to grant jurisdictional immunity to alien defendants who have done business in this country thereby destroying any real possibility of holding them accountable for their violation of federal statutes.[1] This immunity is granted in spite of the defendants' apparently extensive contacts throughout the country, because the defendants' contacts in Louisiana where the suit was filed, are so minimal that the state's long-arm statute cannot be used for service of process, under traditional *International Shoe*[2] principles.

I can understand that in a diversity case a federal court should be restricted in the use of a state long-arm statute to situations in which a defendant's state contacts

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1. In this opinion the term "alien", when applied to a corporation, refers to a corporation organized under the laws of a foreign country. The term "foreign", when applied to a corporation, refers to a corporation organized under the laws of a state other than the state of its forum.

   Wolff is a corporation organized under the laws of Great Britain with its offices in London. Gourlay is a British citizen with his office in Wolff's suite of offices. Neither has an office in the United States.

2. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

are sufficient to meet the requirements of fairness under the due process clause of the fourteenth amendment. I cannot understand the rationale for imposing state legislative and territorial restraints on federal courts in a federal question case involving a national policy, such as that embodied in the Commodities Exchange Act, calling for national uniformity in enforcement.[3] The majority's conclusion does violence to the structure of the American polity. A federal court's service arm in a federal question case should not be handcuffed to the place of the court's seat.

Statutes and rules should be construed so as *not* to reach an irrational result. Here there is a bizarre hiatus in the Rules. There is no national long-arm service of process provision in the Commodities Exchange Act. And Rule 4 does not appear to provide for service of process on and personal jurisdiction over an alien corporation which may have numerous contacts with the nation but few contacts with either the forum state or with any other particular state. When there is a hiatus in the Federal Rules the district court may establish its own ad hoc rule, provided that it is fair and reasonable and not inconsistent with any of the express rules. In a federal question action, aggregating a defendant's national contacts is analogous to aggregating state contacts in a diversity case. Aggregation of national contacts is a fair and reasonable ad hoc solution to the problem. The basis for amenability to suit is the relationship between the defendant and the forum. In a diversity action in which a federal court sits as a state court, there is good reason to be guided by *International Shoe*. No such reason exists when the federal court sits as an integral part of our national system of courts responsive to federal law and federal objectives.

3. Justices Black and Douglas opposed the submission of the Rules of Civil Procedure to Congress and their approval by the United States Supreme Court. They had little or no objection to "simple housekeeping details", but they objected strongly to rules which "substantially affected litigants and in practical effect were equivalent of new legislation". Statement by Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865 (1963). The justices "could see no reason why the extent of a Federal District Court's personal jurisdiction should depend on the existence or nonexistence of a state's 'long-arm statute' ". *Id.* at 869.

I.

I start with Rule 1 of the Federal Rules of Civil Procedure:

> [These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.

Here, the defendants' Louisiana connections are so tenuous as to be insubstantial for purposes of complying with the minimum contacts rule, as established in *International Shoe* and its progeny, and apparently the defendants' contacts are insubstantial with respect to any particular state, even New York. In the aggregate, however, the defendants' contacts with the country as a whole are substantial. The defendants do not suggest that they have substantial contacts elsewhere in the United States or that this forum is less convenient to them than some other forum in this country. The district court found the defendants subject to its jurisdiction,[4] until the defendants called the *DeMelo*[5] case to its attention.

4. In order dated May 13, 1983.

5. *DeMelo v. Touche Marine, Inc.*, 711 F.2d 1260 (5th Cir1983).

The majority's construction of Rule 4 brings about the unjust, inconvenient, and expensive result of immunizing Wolff and Gourlay from liability, except for suit by the plaintiffs in Great Britain, and there is no likelihood that a British court would find liability for the violation of, or even understand, the technical federal statute here involved. I believe that there is an alternative construction of the Rules in keeping with the objectives of Rule 1, and that suit in a United States forum will give both sides fair consideration of the substantive issue.

II.

Rules of procedure are just that, rules of procedure. They are not substantive. They are for efficient housekeeping. To assure that the rules would be limited to procedure, Congress provided that they must not "abridge, enlarge or modify any substantive right". 28 U.S.C. § 2072. Rule 4 provides the mechanics for service of process. It has no necessary relation with a court's *acquiring* personal jurisdiction.

Indeed Rule 82 provides in part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

In short, if there is personal jurisdiction, Rule 4 should not be construed as limiting the jurisdiction of the United States district courts. "With the adoption of the Federal Rules of Civil Procedure in 1938", Professor Marilyn J. Berger has written, "Congress finally attempted to provide a uniform standard for *exercising* personal jurisdiction in federal courts. Despite that attempt there is currently no uniform method for *acquiring* personal jurisdiction in federal question cases. A contributing factor to the lack of uniformity is Federal Rule of Civil Procedure 4. . . . Although the Rule describes the mechanism for service of process, it does not clarify the amenability basis [that is, the relationship between the defendant and the forum]".[6]

In short, if there is personal jurisdiction, Rule 4 should not be construed as limiting the jurisdiction of United States district courts.

III.

A. Rule 83 provides in part:

> In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules.

In *Petrol Shipping Corp. v. Kingdom of Greece, Min. of Com.*,[7] the Second Circuit did not shrink from approving a method of service to fit a situation not contemplated by the rules. The defendant was the Greek Ministry of Trade, State Purchase Directorate, and service of process was effected by ordinary mail addressed to that agency. The court concluded that the defendant was merely an agency of the Greek government. Acknowledging that "[n]either Rule 4(d)(3), nor any other part of Rule 4, provides for service on such a party",[8] the Court

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6. Berger, Acquiring *In Personam* Jurisdiction in Federal Question Cases: Procedural Frustration under Federal Rule of Civil Procedure 4, 1982 Utah L.Rev. 285, 286.

7. 360 F.2d 103 (2d Cir.1966).

8. 360 F.2d at 107.

did not bow out of the case. Instead it fashioned a rule not inconsistent with Rule 4:

> But the fact that Rule 4 does not provide a method for service on respondent does not mean that no service could be effective. Rule 83 permits "each district court, by action of a majority of the judges thereof" to "make and amend rules governing its practice not inconsistent with these rules." The Rule goes on to say, "in all cases not provided for by rule, the district court may regulate their practice in any manner not inconsistent with these rules." See also 28 U.S.C. § 2071.
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> And when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules. Rule 83, supra; *see In re United Corp.*, 283 F.2d 593 (3d Cir.1960). *There is no compelling reason why the court must fashion the rule in advance,* although the better practice in a case such as this might be to secure an advance ruling, approving a given method of service.[9]

In re United Corp.,[10] cited in the *Petrol Shipping* opinion, arose in a different context, but it shows the lattitude extended to a district court in fashioning its own rule. The district court denied attorneys the right to file objections to allowance of fees and expenses for services rendered in the reorganization of a corporation, when the attorneys appeared and requested leave to file objections on the day of the hearing on that subject, fifteen days after the deadline fixed by the court for filing objections. No rule covered the situation. The Court of Appeals for the Third Circuit approved the district court's order:

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9. 360 F.2d at 108 (emphasis added).

10. 283 F.2d 593 (3rd Cir.1960).

> A United States District Court, in all cases not provided for by the Federal Rules of Civil Procedure, 28 U.S.C., or by its local rules, may regulate the practice to be followed in proceedings properly before it in any manner not inconsistent with the Federal Rules of Civil Procedure or statute. See Rule 83, Fed. Rules of Civ.Proc. and Section 2071, Title 28 U.S.C. The manner and enforcement of such regulations rests in the court's sound discretion and will not be interfered with by an appellate tribunal in the absence of a showing of arbitrariness or fundamental unfairness.

283 F.2d at 596.

There is no federal rule and no local rule governing service of process on alien defendants or personal jurisdiction over alien defendants. The language of Rule 4(e) does not contain any suggestion that it provides the exclusive method for obtaining service and personal jurisdiction over an alien defendant. Indeed the first sentence of Rule 4(e) provides:

> Whenever a statute of the United States or an order of the court thereunder provides for service of a summons, or notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, *in a manner stated in this rule.* (Emphasis added.)

The permissive words "may be made" suggest that other methods are permissible. The unqualified words "in a manner stated in this rule" suggest that the method of service should be analogous to service under a state long-arm statute. The analogy here is between state and na-

tion, between state contacts and national contacts, between the due process clause of the fourteenth amendment and the due process clause of the fifth amendment. Rule 4(e) should be read as silent on the point at issue or, at most, permitting a nonexclusive form of service on an alien or foreign defendant, when there are sufficient state contacts to justify use of the state long-arm statute.

Rules 82 and 83, considered with Rule 1, point to courts' *not* taking a scrivener's arid reading of the Federal Rules. The rules were adopted in 1938 to get away from rigid common law procedures. The growth of multinational corporations engaging in international commercial activities strongly argues for a flexible view of the personal jurisdiction of national courts when the defendant is an alien. The due process protection of the fifth amendment and the liberal transfer provision of the Rules will ensure an alien defendant a fair trial.

B. I summarize to this point. Rule 4 describes the mechanism for service of process. It says nothing about jurisdiction, because regardless of service, there must first be jurisdiction. But there is no reason for federal courts to be bound by a state test of jurisdiction. The state test is based on the due process clause of the fourteenth amendment: fairness demands that the defendant have substantial contacts with the state, as established in *International Shoe* and other decisions of the Supreme Court. *International Shoe*, as everyone knows, concerned the reach of a state law in a state court action. But the appropriate test for a federal question case is a federal test: Are the contacts with the country as a whole substantial enough to satisfy the due process clause of the fifth amendment?

No one denies that the district court had subject-matter jurisdiction, for the defendants allegedly violated a federal statute enbodying what was intended to be a uniform national policy on commodities exchanges. The defendants advertised in the Wall Street Journal, conducted a number of investor meetings in various states, and had many contacts with the country as a whole. No one pretends that in a civil suit in Great Britain the courts would look kindly on enforcement of the United States securities laws. It passes belief that Congress intended to provide aliens a sanctuary from liability because of a housekeeping rule for federal courts that was obviously not written with alien defendants in mind.

IV.

In *International Shoe* the Supreme Court held that the "Fourteenth Amendment requires that the defendant's operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just . . . to permit the state to enforce the obligations which [the defendant] has incurred there". 326 U.S. at 320, 66 S.Ct. at 160. As a result, "the overwhelming concensus among federal courts is to analyze questions of *in personam* jurisdiction over alien defendants by examining the relationship of the defendant, the litigation and the forum under traditional *International Shoe* principles." *Superior Coal Co. v. Ruhrkohle A.G.*[11] This fits nicely in a diversity case and allows for variations caused by diverse state statutes, whether the statute is narrow or broad. But it is not designed for federal question cases involving a congres-

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11. 83 F.R.D. 414, 419 (E.D.Pa.1979).

sional law that should be uniformly enforced.[12] In such cases a defendant could never be brought to trial or a trial could be held in an inappropriate location, because the defendant lacks the requisite contacts with the state in which the suit is filed.[13] "The result is the subju-

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12. "The necessary use of differing state long-arm statutes, and the determination of minimum contacts with a particular state means that the effective benefit and production of many federally created rights can be limited by the law of the state in which the district court sits." Recent Decision, 9 Vand.J. Transnat'l L. 435, 444 (1976).

13. In *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.1981) the Court affirmed a district order dismissing an admiralty claim against a Japanese corporation which did conversion work on American ships in Japan. Service was obtained under a New Jersey long-arm statute. The Court of Appeals found that the defendant's contacts with New Jersey were insufficient to support personal jurisdiction.

In a strong and persuasive dissent, Judge John J. Gibbons argued:

> When a court asserts personal jurisdiction over a foreign defendant on the basis of a state law claim, it must ensure sure that the forum state does not unduly encroach on a sister state's interests. When a court, state or federal, adjudicates a federal claim, the federalism issue is of no relevance, for the court determines the parties' rights and liabilities under uniform national law. No state intrudes on another's interests. The only relevant interest is the national one. Thus the applicable constitutional due process provision should not be the fourteenth amendment, but the fifth amendment.
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> *See Stabilisierungsfonds fur Wein et al. v. Kaiser Stuhl Wine Distributors Pty. Ltd. et al.*, 647 F.2d 200 (D.C.Cir.1981), at 203 & n. 4. . . . A defendant's national contacts enter into the fifth amendment fairness analysis, for it would be unreasonable to subject to suit in the United States a foreign national defendant who had but one fleeting connection with this country. But it is not necessary, under the fifth amendment due process clause, that the defendant's con-

(Continued on following page)

gation of the federal interest in enforcement of federal laws to state considerations that should be irrelevant."[14] Federal courts should "disregard" state law "provisions that are irrelevant in the federal context".[15]

Federal courts are common law courts. The genius of the common law has been its capacity for innovation and growth, its ability to fill those interstices in the law inadvertently left by legislative enactment. Nothing in the Rules suggests that the Supreme Court in adopting them intended to foreclose any other method of service that would satisfy the requirements of due process. The majority uses a gap in the procedural rules to work an injustice in the substantive result, failing to exercise the judicial power imparted to us by Article III of the Constitution and the court's common law power implicitly confirmed by the seventh amendment.

In *Cryomedics, Inc. v. Spembly, Ltd.*,[16] the District Judge Jon Newman, who is now on the Court of Appeals

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(Continued from previous page)

> tacts relate primarily to the particular United States location in which the claim arose. Thus, for example, it would not be unfair under the fifth amendment to subject a foreign national shipper to suit in New Jersey on the basis of an admiralty claim that arose in that state, even if the offending ship was the only one ever to dock in New Jersey, and all of defendant's other ships land in Texas. [T]he availability of witnesses points to the District of New Jersey as the most convenient forum for the litigation.

654 F.2d at 292.

14. Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdiction Standard, 95 Harv.L.Rev. 470, 472 (1981).

15. *Von Mehren v. Trautman*, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1125 n. 6 (1966).

16. 397 F.Supp. 287 (D.Conn.1975).

for the Second Circuit specifically considered the issue before this court without referring to Rule 4(e). Cryomedics, a Connecticut corporation, brought an action in federal court against an alien corporation for patent infringement. The alien corporation, Spembly, Ltd., filed a motion to dismiss based upon lack of personal jurisdiction. Judge Newman held:

> [I]t is not necessary to decide whether Spembly's contacts with Connecticut are alone sufficient to satisfy the demands of the Constitution. When a federal court is asked to exercise personal jurisdiction over an alien defendant sued on a claim arising out of federal law, jurisdiction may appropriately be determined on the basis of the alien's aggregated contacts with the United States as a whole, regardless of whether the contacts with the state in which the district court sits would be sufficient if considered alone. . . . If the defendant's contacts with the United States are sufficient to satisfy the fairness standard of the Fifth Amendment . . . then the only limitation on place of trial would be the doctrine of *forum non conveniens*.

397 F.Supp. at 290 (citation omitted). The court in *Cryomedics, Inc.* continued:

> The few courts that have explicitly considered the appropriate unit of government with which there must be contacts have all agreed that the aggregation of an alien defendant's contacts with the United States is the proper procedure in a case arising under federal law. . . . It is difficult to see how *International Shoe* and its progeny, which dealt with the limits on the jurisdiction of state courts, and on which Spembly bases its arguments, could be read to limit the jurisdiction of a federal court on a federally created cause of action. . . .

397 F.Supp. at 291.

Significantly, in *Cryomedics* the defendant did not challenge the validity of the service. Here too the defendants have not challenged the validity of the service. Even if they have not waived their right to challenge service of process, the issue is: were there sufficient contacts for the court to have personal jurisdiction? On that issue there is no challenge and there can be no question. Failure to challenge service opens the door to inquiry into the sufficiency of the contacts between the defendant and the governmental entity of which the court was a part. Here, that entity was the United States and the fairness standard was the due process clause of the fifth amendment, not of the fourteenth amendment. The territorial limits therefore were the boundaries of the United States, not the state in which the court happened to sit, and the determination of the sufficiency of the contacts to support personal jurisdiction turned on contacts with the nation, not those with the state.

Cryomedics, characterized as the leading case accepting the aggregate contacts test, did not blast off without authority.[17] Judge Newman pointed to *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*,[18] in which the court in an antitrust action against a Greek defendant considered the defendant's ties to the state in which it sat, yet, "argued convincingly that it is not the territory in which a court sits that determines the extent of its jurisdiction, but rather the geographical limits of the unit of

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17. But see Note, Alien Corporations and Aggregate Contacts: A Genuinely Federal Standard, 95 Harv.L.Rev. 470, 481 (1981).

18. 289 F.Supp. 381 (S.D.Ohio 1967).

government of which the court is a part [especially] 'where national uniformity in enforcing [federal] right should be the true guideline' ". 397 F.Supp. at 290-91.

The Cryomedics court also cited *Holt v. Klosters Rederi A/S,*[19] a suit under the Death on the High Seas Act, in which the court upheld jurisdiction on the basis of a contract exclusively outside the forum state. Furthermore, the *Cryomedics* court quoted from *Engineered Sports Products v. Brunswick Corp.,*[20] a patent infringement action, holding that "[d]ue process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States because each state makes up only a fraction of the substantial nationwide market for the offending product" 362 F.Supp. at 728, and concluded that an alien "which transacts business in the United States only through other countries and which maintains a place of business only in the country of its incorporation . . . has no reason based on fairness to prefer any one particular district to any other" 397 F.Supp. at 292 (quoting *Engineered Sports Products,* 362 F.Supp. at 728).

In 1961 Professor Thomas F. Green, Jr. formulated the aggregate contacts test.[21] Shortly after, in *First*

19. 355 F.Supp. 354 (W.D.Mich.1973). In *Holt,* as in *Cryomedics,* the defendant failed to challenge the validity of the service. *Cf. Engineering Equipment Co. v. S.S. Selene,* 446 F. Supp. 706, 709-10 (S.D.N.Y.1978) in which the court aggregated the national contacts of an alien defendant to determine whether quasi in rem jurisdiction could be exercised.

20. 362 F.Supp. 722 (D.Utah 1973).

21. Green, Federal Jurisdiction in Personam of Corporations and Due Process, 14 Vand.L.Rev. 967 (1961).

Flight Co. v. National Carloading Corp.,[22] the court adopted the test in an action against a foreign corporation for damage to cargo. Service was affected under Rule 4(d)(3), but the court clearly expanded the scope of its minimal contact inquiry to the national forum. The court noted that Professor Green had suggested that "state jurisdiction under the Fourteenth Amendment is . . . suitable for analogical application to federal jurisdiction under the Fifth Amendment. . . . The Supreme Court has left no doubt but that the material constitutionality inquiry in this regard concerns not contacts with the physical territory of the court, but rather contacts with the sovereignty of which the court is an arm. And the sovereignty of which a federal court is an arm is, of course, the United States." 208 F.Supp. at 738.

Centronics Data Computer Corp. v. Mannesmann, A.G.,[23] was an antitrust action against a German corporation. The court found that it had jurisdiction; otherwise "aliens could commit serious torts or contract breaches without ever having enough contacts with any one forum to give those injured an opportunity to seek redress". 432 F.Supp. at 664.

Although it must be admitted that the weight of authority, both in the cases and in the commentary, rejects the aggregate contacts doctrine, I am not persuaded by authority that leads to an irrational and unnecessary result. Judging requires something more than counting how many cases are *pro* and how many are *con.* In a

22. 209 F.Supp. 730 (E.D.Tenn.1962). The claim was under 49 U.S.C. § 20(11)-(12) (1976).

23. 432 F.Supp. 659 (D.N.H.1977).

federal question case with respect to a matter as important as personal jurisdiction over alien and foreign defendants, I would construe the rules to achieve the objectives of Rule 1. By analogy to *International Shoe* and its progeny, personal jurisdiction is found in the relationship of the defendants to the nation and the aggregate of their contacts with the nation as a whole. The due process clause of the fifth amendment is at least as effective as the corresponding clause in the fourteenth amendment in assuring fairness to the alien defendant.

V.

Burstein and *DeMelo* present a superficially attractive, heuristic way out of a bad situation—into a worse situation. It is something like using a sword on the Gordian knot and finding the edge so blunt that it simply mangles half the knot, leaving that part still entangled.

I would hold that the district court was right the first time in holding:

> Since the Congressional statutes support the exercise of personal jurisdiction to the extent of due process, we would need to look to Louisiana state statutes (such as "long-arm"), if at all, for methods of service of process only. No service of process issue is raised.
>
> In a claim based upon a federal securities or commodities statute, whether the quality and nature of a foreign defendant's activities support a fair play and substantial justice determination, *International Shoe v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), involves a consideration of all of defendant's activities in the United States, not just in the forum state. *See Leasco, supra,* and *Mariash v. Morrill,* 496 F.2d 1138 (2nd Cir.1974).

> Factors to be considered are whether the defendant was doing business in the United States, whether the defendant did an act in this country related to the claim, and whether the defendant caused an effect in the United States by an act done elsewhere.

This is a reasonable ad hoc ruling on a hiatus in the Rules. It is not inconsistent with Rule 4(e) and is highly consistent with Rules 1, 82, and 83, and with the objective of the Commodities Exchange Act. It is consistent with the role federal courts are designed to play in the American polity.

PETITIONER'S

BRIEF

No. 86-740

In The
Supreme Court of the United States
October Term, 1986

OMNI CAPITAL INTERNATIONAL, LTD., *et al*,
Petitioners,

vs.

RUDOLF WOLFF & CO., LTD., *et al*,
Respondents.

ON WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

ROBERT A. KUTCHER*
JOHN D. FRICKE
OF
BRONFIN, HELLER, STEINBERG & BERINS
2500 Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 568-1888
Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

1. Whether, in a purely federal question case arising under the Commodities Exchange Act against alien commodities brokers, Federal Rule of Civil Procedure 4 (e) limits the personal jurisdiction of a federal district court to the same long-arm jurisdictional limitations imposed upon a state court in the state where the district court is located?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 795 F.2d 415. (Joint Appendix p. 26). The opinions of the district court are not reported. (See Joint Appendix pp. 6, 22).

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JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 25, 1986. No petition for rehearing was filed. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides, in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

2. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

3. Section 6(c) of the Commodities Exchange Act codified at 7 U.S.C. § 13a-1, provides, in relevant part:

> "Whenever it shall appear to the Commission that any contract market or other person has engaged, is

engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, . . . the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said Courts shall have jurisdiction to entertain such actions. . . . Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found."

4. Section 6(d) of the Commodities Exchange Act codified at 7 U.S.C. § 13a-2, provides in relevant part:

> "The district courts of the United States, . . . shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with the respect thereto. . . ."
>
> Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

5. Section 18 of Title 7 of the United States Code, provides in relevant part:

> "If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, . . . may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States . . ."

6. Section 25 of Title 7 of the United States Code, provides, in relevant part:

> "The United States district courts shall have exclusive jurisdiction of actions brought under this section . . .".

7. Federal Rule of Civil Procedure 4(e), provides, in relevant part:

> "Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in the manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

8. Federal Rule of Civil Procedure 82 provides, in relevant part:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district court or the venue of actions therein.

9. Federal Rule of Civil Procedure 83 provides, in relevant part:

> "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

10. Federal Rule of Civil Procedure 1 provides, in relevant part:

> "These rules govern the procedure of the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

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STATEMENT OF THE CASE

On February 26, 1980, Point Landing, Inc. and Point Landing Fuel Corporation filed an action (hereinafter "Point Landing") in the United States District Court for the Eastern District of Louisiana against Omni Capital International, Ltd. ("Omni International"), Omni Capital Corporation ("Omni Capital"), Richard Friedberg, Michael Stern, Barry Minsky, and Rudolph Wolff & Co., Ltd. ("Wolff"). Omni International and Omni Capital, in

turn, cross-claimed Wolff and filed third-party complaints against James Gourlay and Main, Hurdman[1], formerly Main-LaFrentz, an accounting firm.

On February 12, 1981, William S. Smith, Jr. and Ruby M. Smith filed a similar action (hereinafter "Smith") against Omni International, Omni Capital, Northglen Capital Corporation ("Northglen"), Richard Friedberg, Michael Stern, Barry Minsky, W. Lewis Ryder and Competex, S.A.[2]

In *Smith*, Omni International, Omni Capital, and Northglen filed third-party complaints against Wolff, James Gourley and Main, Hurdman and filed a cross-claim against Competex, S.A.

On May 15, 1981, Frank J. George and Brenda A. George filed an action (hereinafter "George") against the identical defendants named in the *Smith* action. Subsequently, identical third-party complaints were filed.

The above mentioned cases[3] were consolidated for resolution. In each of the consolidated cases, plaintiffs originally sought damages under the Securities Act and the rules promulgated thereunder. Subsequent to consolidation of this matter, plaintiffs amended their complaints to

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[1]Main, Hurdman, an accounting firm, was third-partied based on an opinion letter furnished Omni and Northglen included in their investment program literature.

[2]Cometex, S.A., brokerage firm, is a corporation organized under the laws of the nation of Switzerland. It is defunct and has never appeared in this litigation.

[3]Another suit filed by Dennis M. Rosenberg and Joan Rosenberg against the same defendants named in *Smith* and *George* above on November 25, 1981 was also consolidated with the aforementioned actions.

include a claim for damages under Sections 4b and 9b of the Commodities Exchange Act ("Commodities Act") (7 USC §§ 6b and 13b). In all the cases, plaintiffs allege that Omni International, or an agent thereof, contacted them concerning an investment program offered by Omni Capital. The program entailed the purchase and sale of options and contracts in silver commodity futures on the London Metals Exchange through the use of trading accounts established with Omni International or Omni Capital and/or Northglen.

Depending on the individual plaintiffs involved, Wolff and/or Competex S.A. acted as principal in the London Metals Exchange. These principals would actually buy or sell options and contracts in the silver commodity futures for the account of the various plaintiffs. Wolff and/or Competex would, in turn, send confirmation slips to the various parties directly notifying them of the London trades.

In the instant consolidated litigation, Omni International, Omni Capital and/or Northglen third-parties or cross-claimed Rudolph Wolff, Competex S.A. and James Gourlay, a London resident, a former principal or agent of both Competex and Wolff. The basis of the third party complaints and cross-claims is that if any liability resulted to the third party plaintiffs, it was not a result caused by Omni or Northglen, but the improper trading activities of the various London brokers.

Motions seeking dismissal of the claims on grounds of lack of personal jurisdiction were filed by Wolff, James Gourlay and Barry Minsky. Accompanying motions seeking dismissal of the various securities claims under sec-

tions 10(b) and 20 of the Exchange Act (15 USC § 78j and 15 USC § 78t) and 17 of the Securities Act (15 USC § 77q) were also filed. The District Court, on May 16, 1983, granted the defendants' motion to dismiss, leaving only those claims asserted pursuant to the Commodities Exchange Act.

Additionally, the District Court, on May 16, 1983, denied the motions of Wolff, Gourlay and Minsky to dismiss for lack of personal jurisdiction. The district court held that the nationwide service of process provisions of the federal securities and commodities laws required only that Wolff and Gourlay have sufficient contacts with the United States (not Louisiana) to comport with due process and that a *prima facie* case for personal jurisdiction had been established.

Shortly thereafter, the Fifth Circuit issued its opinion in *DeMelo v. Toche Marine, Inc.*, 5th Cir. 1983, 711 F.2d 1260. In *DeMelo*, the Fifth Circuit held that when a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is utilized to serve an out-of-state defendant, Rule 4(e) requires that the state's standard of amenability to jurisdiction apply. Id. at 1266.

Wolff and Gourlay, relying on *DeMelo*, then renewed their objections to the court's personal jurisdiction. On reconsideration, the district court held that: (1) the CEA preempts private actions under § 10b of the 1934 Act and Rule 10b-5; (2) the CEA does not expressly or impliedly authorize nationwide service of process in private actions; (3) *DeMelo* requires an application of the Louisiana long-arm statute in private actions under the CEA; and (4)

neither Wolff nor Gourlay was subject to the jurisdiction of Louisiana state courts. The district court then dismissed the claims against Wolff and Gourlay for lack of personal jurisdiction. After argument to the panel, the Fifth Circuit decided to hear this appeal *en banc* without the panel to which the consolidated appeals were first assigned issuing an opinion.

On appeal, a divided Court of Appeals affirmed. The Fifth Circuit recognized that the CEA affords plaintiffs their exclusive remedy. Further, the Fifth Circuit held that: (1) The CEA does not expressly or impliedly authorize nationwide service of process in private actions; (2) in the absence of specific provisions to the contrary, Rule 4(e) adopts the state provisions on amenability to service and on manner of service requiring the application of the Louisiana long-arm statute in private actions under the CEA; and (3) in light of the language of Rule 4(e) of the Federal Rules of Civil Procedure, and absent specific congressional authority to the contrary, a federal district court has no personal jurisdiction over a defendant who cannot be reached by a long-arm statute of the state in which the district court sits.

Judge Wisdom, joined by Chief Judge Clark and Judges Rubin, Politz, Johnson and Williams, concurred in part and dissented in part on the grounds that nationwide service of process should be applied in private actions under the Commodities Exchange Act. Judge Wisdom observed that the majority's conclusion did violence to the structure of the American polity. In addition, Judge Wisdom stated that in a diversity action, a federal court sits as a state court and is to be guided by principles enunciated in *International Shoe Co. vs. Washington,* 326 U.S. 310 (1945). However, in federal question cases no such reason exists when the federal court sits as an integral part of national system of courts responsive to federal law and federal objectives.

SUMMARY OF ARGUMENT

In federal question cases involving foreign aliens, the governing standard is compliance with the Fifth Amendment. Rule 4(e) does not create personal jurisdiction, nor does the Fourteenth have any application.

This is particularly true in commodities actions. Congress intended the regulatory scheme under the Commodities Act to be as strong and expansive as that regulating the securities markets. For this reason, Congress expressly provided nationwide process and jurisdiction for most actions arising under the Commodities Act. This Court has held that an implied cause of action exists under the Commodities Act and that such actions are a significant enforcement tool in the regulatory scheme established by Congress. Accordingly, consistent with that reasoning, the nationwide process and jurisdiction provisions of the Commodities Act should apply to private causes of action, such as the one before this Court.

Alternatively, notwithstanding the Fifth Circuit's decision, the purpose and development of the Commodities Act clearly support the application of nationwide jurisdictional standards to private commodities fraud cases.

Federal law, not state legislated long arm standards should be used to determine the personal jurisdiction of a federal court in a purely federal question case arising under the Commodities Act. This is the only result consistent with the purposes of state jurisdictional limitations and the intentions of Congress underlying the passage of the Commodities Act. As such, the application of state long arm jurisdictional standards by the Fifth Circuit was in error and its opinion should be reversed.

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ARGUMENT

This case involves an important question concerning the submission of a federal district court to state jurisdictional limitations in a purely federal question matter arising under the Commodities Exchange Act (hereinafter referred to as "CEA"). Specifically, the Fifth Circuit held that, absent a rule or statute to the contrary, Federal Rule of Civil Procedure 4(e) permits a federal court to exercise personal jurisdiction over only those defendants who are subject to the jurisdiction of courts of the state in which the court sits:

I. THE FIFTH CIRCUIT'S DECISION IMPROPERLY ABASES THE POWER OF A FEDERAL COURT TO HEAR PURELY FEDERAL ISSUES

A. The Purposes of Personal Jurisdictional Restraints are not Served by the Fifth Circuit's Decision.

The Fifth Circuit began its analysis of the jurisdictional standard to be applied by noting that federal courts

must ground their personal jurisdiction on a federal statute or rule. Joint Appendix, p. 40. As this Court has established, the requirement that a court have personal jurisdiction does not flow from Article III, but from the Due Process Clause. *Insurance Corp. vs. Compagnie Des Bauxites,* 456 U.S. 694, 702-3, 72 L.Ed. 2d 492, 501-2, 102 S.Ct. 2099 (1982).

This requirement represents a restriction on judicial power, not as a matter of sovereignty, but as a matter of individual liberty. *Insurance Corp. vs. Compagnie Des Bauxites, supra* at 456 U.S. 702-3. Despite this, the Fifth Circuit failed to consider how, if at all, the exercise of personal jurisdiction over Wolff and Gourlay violated these defendants "individual liberty". Instead, the Fifth Circuit embarked on a search for statutory authority for the exercise of personal jurisdiction.

Any such search would naturally be futile. Personal jurisdiction is not a creature of Congress; it represents the exercise by an individual defendant of his constitutionally guaranteed right to due process.[4] As in any liberty interest, an individual's objections to the personal jurisdiction of court may be waived. *Insurance Corp. vs.*

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[4]We recognize that federal courts, as courts of limited jurisdiction, possess no warrant to create jurisdiction of their own. In diversity matters, in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the District Court's is determined by the law of the forum state. *Insurance Corp. vs. Compagnie Des Bauxites, supra* at 456 U.S. 711 (Powell, J., concurring). Yet, this is a federal question case. For this reason, a resort to state standards is inappropriate.

Compagnie Des Bauxites, supra at 456 U.S. 703.[5] Contrary to the Fifth Circuit's findings, the existence of personal jurisdiction is not necessarily dependent on statute.

As even the Fifth Circuit has reasoned on earlier cases, strict federal venue requirements have made it unnecessary to develop a judicial doctrine of the limits of personal jurisdiction in federal cases. *Lapeyrouse vs. Texaco, Inc.,* 693 F.2d 581, 585 n. 10 (5th Cir. 1982); *Terry vs. Raymond International, Inc.,* 658 F.2d 398, 401 (5th Cir. 1981), reh. and reh. *en banc* denied, 667 F.2d 92 (5th Cir.), cert. denied, 456 U.S. 928, 102 S.Ct. 1975, 72 L.Ed. 2d 443 (1982). In federal question cases, the sole test of amenability to jurisdiction, the test of constitutionality, must begin with an inquiry into the Due Process Clause of the Fifth Amendment, not the Fourteenth Amendment. *Lapeyrouse vs. Texaco, Inc., supra* at 693 F.2d 585. While this analysis may be aided by this Court's construction of the Fourteenth Amendment, weight must be given to the differences occasioned by the federal nature of the forum.

A review of the jurisprudence on the Fourteenth Amendment confirms this belief. Even before the passage of the Fourteenth Amendment, this Court sustained the refusal by state courts to grant full faith and credit to judgments entered by courts that were without juris-

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[5]Subject matter jurisdiction is an Article III as well as statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. No action of the parties can confer subject matter jurisdiction. *Insurance Corp. vs. Compagnie Des Bauxites, supra* at 456 U.S. 702. Subject matter jurisdiction must be grounded on statute. The Fifth Circuit seems to acquaint this notion with personal jurisdiction under all circumstances. The application is inappropriate.

diction over non-resident defendants. *Hanson vs. Denckla,* 357 U.S. 235, 255, 2 L.Ed. 2d 1283, 1298-99, 78 S.Ct. 1228 (1958) citing *D'Arcy vs. Ketchum, et al.,* 11 Howard 164, 175, 13 L.Ed. 648, 653 (1850).[6] The passage of the Fourteenth Amendment did not change this result. In *Pennoyer vs. Neff,* 95 U.S. 714 (1877), this Court borrowed principles of state sovereignty from international law and reasoned that every state is analogous to a foreign nation and possess adjudicatory power only over persons present within their boundaries. *Pennoyer vs. Neff, supra* at 95 U.S. 722.

Although these cases dealt exclusively with the personal jurisdiction of a state court, *Pennoyer* established that the concept of personal jurisdiction is one rooted in the Constitution, not statute. The rigid confines of territoriality soon gave way to the more flexible notion of interstate federalism.

In the landmark decision of *International Shoe Co. vs. Washington,* 326 U.S. 310, 90 L.Ed. 103 (1945), this Court found that due process required only that in order to subject a non-resident defendant to a judgment *in personam,* he have certain minimum contacts with it such that the maintenance of the suit not offend "traditional notions

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[6]This Court in *D'Arcy vs. Ketchum, et al,* 11 Howard at 176, stated:

> On the other hand, the international law as it existed among the States in 1790 was, that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of Courts of Justice, had binding force.

of fair play and substantial justice." *International Shoe, supra at* 326 U.S. 316.[7]

After *International Shoe,* this Court reiterated the notion of federalism as a restriction on a state exercise of personal jurisdiction. As explained in *Hanson vs. Denckla, supra* at 357 U.S. 251, 2 L.Ed. 2d 1296, in pertinent part:

> In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer vs. Neff,* 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of *International Shoe Co. vs. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 ALR 1057. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt vs. Vanderbilt,* 354 U.S. 416, 418, 1 L.Ed. 2d 1456, 1459, 77 S.Ct. 1360. Those restrictions are more than a guaranty of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However mninmal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

This decision established that the Fourteenth Amendment analysis developed in *International Shoe* could not be applied so as to eliminate the territorial limitations on the exercise of a state court's power over nonresident defendants.

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[7]*International Shoe* involved an issue whether International Shoe Co., a Delaware corporation, was amenable to proceedings in the courts in the State of Washington. No issue of federal subject matter jurisdiction was involved. This Court proceeded to examine the amenability question against the limitations of the Due Process Clause of the Fourteenth Amendment.

The reasons underlying the minimum contacts test became better defined in *World-Wide Volkswagen Corp. vs. Woodson,* 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980), where is was stated:

> A concept of minimum contacts . . . can be seen to perform two related but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to insure that the states, through their courts, do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

444 U.S. 291-2, 62 L.Ed. 2d 498. In situations involving federal claims against an alien defendant, as here, neither function is served. Nevertheless, the Fifth Circuit's interpretation of Rule 4(e) requires the application of such Fourteenth Amendment minimum contacts approach to this federal question case.[8] An examination of the reasons underlying the Fourteenth Amendment test shows the error in the Fifth Circuit's findings.

1. Concept of Coequal Sovereigns has no Application to Federal Question Cases.

In state court cases, this Court has consistently found that the principles of interstate federalism embodied in the Constitution require the consideration of state lines in determining a state courts' personal jurisdiction. *World-Wide Volkswagen, supra* at 444 U.S. 293. As held in *World-Wide Volkswagen*:

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[8]Both the Fifth Circuit and the District Court agree that under a Fifth Amendment Due Process analysis, both Wolff and Gourlay would be subject to the Court's personal jurisdiction. Joint Appendix, pp. 13, 32. However, the Fifth Circuit did not adopt a Fifth Amendment analysis. Instead, it applied a Fourteenth Amendment standard based upon its interpretation of Rule 4(e).

> The economic interdependence of the States was foreseen and desired by the Framers. . . . But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

World-Wide Volkswagen, supra at 444 U.S. 293. Stated differently, some limitation must be placed on the personal jurisdiction of state courts to avoid usurpation of the sister states sovereign power to try causes involving their citizens. In federal question cases presented in a federal court, the maintenance of coequal sovereignty of sister states is irrelevant. *Handley vs. Indiana & Michigan Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984).[8a]

In the present matter, Congress has created a broad federal scheme under the CEA for the regulation of the commodities markets. Congress has underscored the importance of futures trading to the nation. S. Rep. No. 93-1131, 93rd Congress, 2d. Sess. 19 (1974). Where an expansive national policy governing futures trading finds itself the subject of litigation in a federal court, the Fourteenth Amendment concept of coequal sovereignty of the States has no application. Moreover, the application of a state jurisdictional analysis in such cases is inappropriate.

[8a] The recent decision in *ASAHI Metal Industry Co., Ltd. v. Superior Court of California*, 55 U.S.L.W. 4191, 4197; 107 S.Ct. 1026 (decided February 24, 1987) does not address the question of personal jurisdiction over alien defendants based on the Fifth Amendment. It deals only with the application of the Fourteenth Amendment to foreign nationals in diversity cases.

2. Federal Question Cases Require the Application of a Broader National Concept in Determining Personal Jurisdiction Over Alien Defendants.

Rather than consider the competing interest of sister states, the focus in a federal question case involving an alien defendant must shift to a consideration of the competing interest of the domestic and foreign forums. In the present matter, the paramount interest of the United States to preserve and protect American investment in futures markets is unrefutable. See S. Rep. 93-1131, 93rd Congress, 2d. Sess. 19 (1974).

The conclusions reached by the Fifth Circuit potentially leave the petitioners no recourse against Wolff and Gourlay in the United States. This result renders the private action under the CEA impotent to address the alleged violations of federal law by these defendants. This result cannot be allowed to stand. As Judge Wisdom stated in his dissent:

> No one pretends that in a civil suit in Great Britain the Courts would look kindly on enforcement of the United States securities laws. It passes beyond belief that Congress intended to provide aliens a sanctuary from liability because of a housekeeping rule for federal courts that was obviously not written with alien defendants in mind.

Joint Appendix, p. 59. There is no contention made that another state is a better forum for plaintiffs' claims. The Fifth Circuit's position effectively insulates Wolff and Gourlay from virtually any action in a United States

forum.[9] That was not the contemplation of the Fourteenth Amendment standard for amenability. Its application here does violence to the dignity of a United States District Court to hear a purely federal question which the Fifth Circuit and all parties acknowledge could have been heard had a Fifth Amendment standard been applied.

We suggest that, since Wolff and Gourlay are aliens, it is not their contact with the state of Louisiana that should control, but that their contacts with the Country as a whole must be considered. This "national contacts" theory has been considered by a number of courts.[10] One

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[9]The significance of this risk is real. Although we stress that no merit discovery has occurred in this case, other litigation shows the alarming results of the Fifth Circuit's decision. In the matter entitled "Barry S. Glass, et al vs. Commissioner," CCH Dec. 43, 495 (November 17, 1986), the Tax Court examined the consolidated appeal of over 1,400 tax payers who sought to shelter roughly $100,000,000.00 in income through commodity tax straddles on the London Metal Exchange for tax years 1975 through 1980. Plaintiffs in this case were among those petitioners.

As discussed in that case, Rudolf Wolff traded both option straddles and option hedges for approximately 80 petitioners in that consolidated case. Gourlay employed the option straddle trading strategy for approximately 265 of the petitioners in that case who had discretionary accounts with Competex. The Tax Court held that the London option transactions by Wolff and Gourlay and others lacked economic substance and were a sham resulting in the disallowance of those tax payers' deductions. Despite the seriousness of these charges, Wolff and Gourlay will not be held to account for their actions if the Fifth Circuit's decision is allowed to stand.

[10]Other courts recognizing the existence of the "national contacts" theory include the following: *Honeywell, Inc. vs. Metz Apparatewerke*, 509 F.2d 1137, 1143 n. 2 (7th Cir. 1975) (decided on other grounds); *Centronics Data Computer Corp.*

(Continued on following page)

such case, *Cryomedics, Inc. vs. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975), although not a commodities case, supports the application of the Fifth Amendment standard of amenability, rather than the Fourteenth Amendment standard, in these circumstances.

Cryomedics, a Connecticut corporation, brought an action in federal court against an alien corporation for a patent infringement. The alien corporation, Spembly, Ltd., filed a motion to dismiss based upon lack of personal jurisdiction. The federal court in that matter denied the motion and held:

> "[I]t is not necessary to decide whether Spembly's contracts [sic] with Connecticut are alone sufficient to satisfy the demands of the Constitution. When a federal court is asked to exercise personal jurisdiction over an alien defendant sued on a claim arising out of federal law, jurisdiction may appropriately be determined on the basis of the alien's aggregated contacts with the United States as a whole, regardless of whether the contracts with the state in which the

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vs. Mannesmann, A.G., 432 F. Supp. 659, 664 (D.N.H. 1977); *Cryomedics, Inc. vs. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975); *Holt vs. Klosters Rederi A/S*, 355 F. Supp. 354, 356-57 (W.D. Mich. 1973) (jurisdiction found on this basis); *Alco Standard Corporation vs. Benalal*, 345 F. Supp. 14, 24-25 (E.D. Pa. 1972) (jurisdiction found on this basis under Federal Securities Acts); *Edward J. Moriarty & Co. vs. General Tire and Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967) (decided on other grounds); *First Flight Company vs. National Car Loading Corporation*, 209 F. Supp. 730, 736-737 (E.D. Tenn. 1962) (alien status considered as factor in finding jurisdiction);

Although a substantial number of cases have refuted the "national contacts" theory, we suggest that the sheer number of cases resolving an issue one way rather than another is not dispositive. The final resolution of this issue rests with this Court.

> district court sits would be sufficient if considered alone. . . . If the defendant's contacts with the United States are sufficient to satisfy the fairness standard of the Fifth Amendment . . . then the only limitation on place of trial would be the doctrine of forum non conveniens."

Cryomedics, supra at 397 F. Supp. 290. The court in *Cryomedics, Inc.* continued:

> "The few courts that have explicitly considered the appropriate unit of government with which there must be contacts have all agreed that the aggregation of an alien defendant's contacts with the United States is the proper procedure in a case arising under federal law. . . .
>
> It is difficult to see how *International Shoe* and its progeny, which dealt with the limits on the jurisdiction of state courts, and on which Spembly bases its arguments, could be read to limit the jurisdiction of a federal court on a federally created cause of action. . . ."

We believe the *Cryomedics'* reasoning is applicable to this matter.

Cases involving alien defendants give greater reason for the application of nationwide standards. As the court in *Cryomedics* stated:

> "Analysis of the principle interest protected by *International Shoe* also suggest that wholesale importation of its strictures into federal question litigation and federal court is improper, at least when an alien defendant is involved. When a defendant is a citizen of the United States, there are very real differences in convenience between litgating in a state where it does business or resides, and in one where it has only insignificant contacts; this concern is an important

> consideration underlying the Fourteenth Amendment's restrictions on the reach of state court jurisdiction. The considerations are entirely different, however, when an alien is involved, especially one . . . which transacts business in the United States only through other companies, and which maintains a place of business only in the country of its incorporation. Spembly has no reason based on fairness to prefer any one particular district to any other . . . " 397 F. Supp. at 291-92.

We suggest that federal courts must maintain their constitutionally granted authority to adjudicate cases involving infringements and impingements upon federal rights of its citizens by alien defendants. Categorically restricting jurisdiction in such situations to only those matters within the limited jurisdiction given state courts ignores the constitutional role of federal courts in adjudicating federal rights and the desires of Congress underlying the Commodities Act.

3. Wolff's and Gourlay's Contacts with the United States, not Louisiana Should Govern.

Neither the Fifth Circuit nor the District Court found any due process obstruction to the exercise of personal jurisdiction over Wolff and Gourlay where a Fifth Amendment analysis is used. Joint Appendix, pp. 9-10, 32. Where there is no issue on appeal concerning the amenability of these defendants under the Fifth Amendment analysis, it can hardly be argued that either defendant is unduly burdened by a suit in a federal court sitting in Louisiana.

Nevertheless, an examination of the Fourteenth Amendment standard employed by the Fifth Circuit shows

that the protections contemplated by that test against the burden of litigation in a distant forum have no application here. In cases involving domestic defendants, the minimum contacts analysis includes an "unspoken assumption that an alternative State forum is available." J. Toran, "Federalism, Personal Jurisdiction, and Aliens," 58 Tulane Law Review 758, 772 (1984). In contrast, frequently no alternative State forum is available to a plaintiff suing an alien defendant. This result evinces the inappropriateness of the application of a state jurisdictional standard.

4. Summary.

Despite the inappropriateness of using a Fourteenth Amendment jurisdictional standard in a purely federal question case brought in a federal court, the Fifth Circuit felt compelled to apply such standard to this case. The Fifth Circuit's attempt to fit a square peg into a round hole creates an anomaly inconsistent with the concept of personal jurisdiction. While the Fifth Circuit feels content to live with this anomaly, its effect wrecks havoc on the rights of federal litigants. This result is untenable and should be reversed.

II. A DISTINCTION MAY BE DRAWN BETWEEN DIVERSITY AND FEDERAL QUESTION CASES

It has long been established that the standard to be applied in determining whether federal court has personal jurisdiction over a foreign corporation in purely diversity cases is the state long-arm jurisdictional standard. *Arrowsmith vs. United Press International*, 320 F. 2d 219 (2nd

Cir. 1963). The reasoning behind this application is important to the understanding that such state standards should not apply in federal question cases such as the one before the Court.

First, diversity of citizenship jurisdiction was conferred in order to prevent discrimination in state courts against those not citizens of the state. *Erie Railroad Company vs. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Guaranty Trust Company v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945) ("Guaranty Trust"). The essence of diversity jurisdiction is that a federal court is merely enforcing state law and state policy. *Angel vs. Bullington*, 330 U.S. 183, 191, 91 L. Ed. 832, 838 (1948) ("Angel"). In fact, for purposes of diversity jurisdiction, a federal court is "in effect, only another court of the state." *Angel*, 330 U.S. at 187, citing *Guaranty Trust, supra*. Accordingly, the application of state standards for personal jurisdiction in diversity cases is consistent with the purpose of such federal authority.

Regardless of the Fifth Circuit's interpretation of Rule 4(e), the application of state jurisdictional standards in purely diversity cases is appropriate. See Footnote 4, *supra*. Diversity, however, is not the basis for jurisdiction here. No one denies that the District Court had federal question jurisdiction. These alien defendants allegedly violated a federal statute embodying what was intended to be a uniform national policy on commodities trading. Such federal question jurisdiction is conferred for reasons far different from diversity jurisdiction. As stated in *Angel vs. Bullington, supra* at 330 U.S. 838:

> "[W]here resort is had to a federal court not on grounds of diversity citizenship but because a federal

> right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. *Holmberg v. Armbrecht*, 327 U.S. 392, 90 L. Ed. 743, 66 S. Ct. 582, 162 ALR. 719."

Moreover, federal courts were established to zealously and uniformly apply, protect, and enforce federal rights created by the Constitution and laws of the United States. Delegation by Congress to state legislatures of the power to restrict or expand that power through the enactment of state long arm statutes is contrary to the constitutional purposes for such authority. The Fifth Circuit's interpretation in this matter that a state legislated long-arm jurisdictional standard applies in a purely federal question case is an inappropriate disavowal of the court's powers.

A federal court in a federal question case, unlike diversity cases, is not acting as a federally created "state" court. It is established quite apart from state law and state policies in order to protect the laws of the United States through a federal forum. Federal rights are at stake here and a federal forum was chosen. Under these circumstances, should a federal court look to the state for the standard in determining personal jurisdiction in a purely federal question case? We think not. The standard for determining personal jurisdiction in a federal question case must reflect the constitutionally mandated purposes for which such jurisdiction was granted.

III. THE FIFTH CIRCUIT'S INTERPRETATION OF RULE 4(e) IS CONTRARY TO THE PURPOSE OF THE FEDERAL RULES

As a starting point for its analysis, the Fifth Circuit found that Federal Courts must ground their personal jurisdiction on a federal statute or rule. Joint Appendix p. 40. Although our previous discussion challenges the application of this principle, the Fifth Circuit launched its review of the CEA for authority to exercise personal jurisdiction over the alien defendants in private actions under that act. Finding no such authority, the Fifth Circuit turned its focus to Rule 4. Joint Appendix, p. 42.

In this regard, the Fifth Circuit stated:

> Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained. *Insurance Corp. of Ireland*, 456 U.S. at 715 n. 6, 102 S. Ct. at 2111 n. 6 (Powell, J., concurring). Rule 4 therefore has been characterized as a "jurisdictional provision." "Statement by Mr. Justice Black and Mr. Justice Douglas, 1963, 374 U.S. 865, 869 descending from adoption of amendments to the Federal Rules of Civil Procedure".

Joint Appendix, p. 43. From this passage, the Fifth Circuit seeks justification for its application of state jurisdictional standards to the provisions of Rule 4(e). Reliance on Mr. Justice Powell's concurrence in *Insurance Corp.*, however, is mislaid. Read in its entirety, Mr. Justice Powell observes that:

> Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained. Although Rule 4 deals expressly only with service of process, not

> with the underlying jurisdictional prerequisites, jurisdiction may not be obtained unless process is served in compliance with applicable law. (Citations omitted). For this reason Rule 4 frequently has been characterized as a jurisdictional provision . . .

Insurance Corp. v. Compagnie Des Bauxites, supra, 456 U.S. 715 n. 6 (Powell, J., concurring). As this passage indicates, Rule 4 does *not* deal with the "underlying jurisdictional prerequisites". For this reason, the incorporation of jjurisdictional standards into the language of Rule 4(e) is inappropriate.

Due Process requires that the defendant be given adequate notice of the suit *and* be subject to the personal jurisdiction of the Court. *World-Wide Volkswagen, supra* at 444 U.S. 291, 62 L.Ed. 2d 497. In the present case, it is not contended that notice was inadequate; the only question is whether these particular defendants are subject to the personal jurisdiction of a federal court sitting in Louisiana. The elements of notice and personal jurisdiction are then separate and distinct as evidenced by this Court's findings in *World-Wide Volkswagen.* Rule 4 addresses only notice; not jurisdiction.

As observed by Mr. Justice Powell, it is only because service is necessary for the exercise of jurisdiction that Rule 4 is occasionally termed a jurisdictional provision. *Insurance Corp. v. Compagnie Des Bauxites, supra.* The Fifth Circuit reads much more into this statement. Such an interpretation is contrary to the function of Rule 4 in our federal system.

As Judge Wisdom observed:

> Rules of Procedure are just that, rules of procedure. They are not substantive. They are for efficient housekeeping . . . Rule 4 provides the mechanics for service of process. It has no necessary relation with the Courts *acquiring* personal jurisdiction.
>
> . . .
>
> In short, if there is personal jurisdiction, Rule 4 should not be construed as to limiting the jurisdiction of the United States District Courts.

Joint Appendix, pp. 54-55. We agree. Rule 4 is a procedural provision governing only the method of service. As stated by Mr. Justice Powell, it does not deal with the underlying jurisdictional prerequisites for the exercise of personal jurisdiction.[11] The incorporation of such jurisdictional limitations into the language of Rule 4(e) inexplicably alters the role of the Federal Rules. This result was unintended by Congress. For this reason, the decision of the Fifth Circuit must be reversed.

IV. NATIONWIDE JURISDICTIONAL PROVISIONS APPLY TO PRIVATE ACTIONS BROUGHT UNDER COMMODITIES ACT

A. Purpose and Development of Commodities Act Requires Application of Nationwide Standards.

Assuming that a statutory provision is even needed for the exercise of personal jurisdiction, we suggest that

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[11]The claims originally brought by plaintiffs were under the Exchange Act. Under the provisions of § 27 of that act, service of process is permitted "wherever the defendant may be found." 15 U.S.C. § 78aa. Yet, no method of service is indicated. It is beyond cavil that a securities plaintiff who chooses to employ Rule 4(e) to effect service would not be required to satisfy state jurisdictional standards. As such, the Fifth Circuit's interpretation of Rule 4(e) would seem inappropriate.

the provisions of the Commodities Act give a clear indication of the appropriateness of nationwide process and jurisdiction in private actions arising under that Act. With few exceptions, whenever Congress provided judicial resort for the enforcement of the Commodities Act, provisions were consistently made for nationwide process and jurisdiction.[12]

The reasons for Congress' consistent grant of nationwide process and jurisdiction in actions arising under the Commodities Act are reflected in the Senate Report on the Commodities Futures Trading Commission Act of 1974 which states:

> "A person trading in one of the currently unregulated futures markets should receive the same protection afforded to those trading in the regulated markets. Whether a commodity is grown or mined, or whether it is produced in the United States or outside, makes little difference to those in this country who buy, sell, and process the commodity, or to the U.S. customers whose prices are affected by the future market in that commodity. . . .
>
> It is apparent that a regulatory agency cannot be expected to oversee the rapidly expanding and complex futures markets without additional tools with which

[12]In 7 USC § 13a-1, for instance, Congress expressly provided for nationwide process and jurisdiction in those actions initiated by the Commission for enforcement of the Act. Similarly, in Section 13a-2, Congress granted state attorney generals the authority to enforce the requirements under the Commodities Act and the rules and regulations thereunder in federal court. In these cases, just as Commission enforcement actions, Congress provides for nationwide process and jurisdiction. Additionally, in 7 USC § 18, Congress granted to persons for whose benefit a Commission order is made, the right to enforce such orders in federal court. Here again, Congress provided for nationwide process and jurisdiction.

> to do the job. . . . *The importance of futures trading to the general public and to the Nation equals the importance of the securities markets.* It is, therefore, time to establish a regulatory authority in the commodity field similar to the Securities and Exchange Commission and to give that authority a strong law which will enable it to regulate both agricultural and nonagricultural goods and services in the public interest. S. Rep. No. 93-1131, 93rd Congress, 2d Sess. 19 (1974) (emphasis added).

Congress recognized the need for a strong and expansive regulatory scheme in the area of futures trading. As part of that scheme, Congress provided nationwide process and jurisdiction for many actions arising under the Commodities Act. As established in *Merrill Lynch, Pearce, Fenner & Smith vs. Curran*, 456 U.S. 353, 72 L.Ed. 2d 182, 102 S.Ct. 1825 (1982), the implied private cause of action is a "significant enforcement tool" in the regulatory scheme under that Act. *Merrill Lynch*, 456 U.S. at 393-4. Accordingly, the private commodities fraud action must be given the same dignity as other "tools" or actions established by Congress for the enforcement of the Commodities Act.

At the time *Merrill Lynch* was rendered, all other civil actions provided under the Commodities Act permitted nationwide service of process. If Congress implicitly created a private cause of action, it is difficult to justify the denial of nationwide service to such actions where all other enforcement tools enjoyed that breath. This is especially true where the predecessor action under the Securities Act enjoyed nationwide service.

Clearly, Congress intended to create a regulatory scheme in the area of futures trading equal to that which governs our securities markets. In private actions under

the securities acts, Congress provided nationwide process and jurisdiction. See § 27 of the Securities Exchange Act, 15 USC § 78aa. Again, with few exceptions, the express causes of action established under the Commodities Act enjoy precisely the same nationwide process and jurisdiction. The reason for such similarity is simple. Congress recognized that regulation of futures trading markets is just as vital to the public interest as regulation of securities markets. Accordingly, the tools established by Congress, including the private cause of action under the Commodities Act, to enforce the provisions of that Act must be given the reach of nationwide process and jurisdiction.

Even the district court initially held that:

> "Claims are asserted against both these defendants [Wolff and Gourlay] under the two Securities Acts and the Commodities Act. We conclude that, while none of the three statutes deals specifically with the issue, as to all three statutes Congress intended for U.S. courts to exercise personal jurisdiction over foreign defendants not present in the United States to the limits of the due process clause of the Fifth Amendment. All three statutes contain broad provisions with respect to venue and service of process which support this conclusion.
>
> Since the Congressional statutes support the exercise of personal jurisdiction to the extent of due process, we would need to look to Louisiana state statutes (such as "long arm"), if at all, for methods of service of process only. No service of process issue is raised.
>
> In a claim based upon a federal securities or commodities statute, whether quality and nature of a foreign defendant's activities support a fair play and substantial justice determination . . . involves a consideration of all of defendants' activities in the United States, not just in the forum state." Joint Appendix, pp. 9-10.

The district court found that under the federal "cause effects" standard for determining personal jurisdiction, both Wolff and Gourlay would be subject to the jurisdiction of the court. The Fifth Circuit agreed. Applying this nationwide standard, the district court originally denied the motions to dismiss. The district court later reconsidered this result after the Fifth Circuit decision in *DeMelo vs. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983).

The application of the nationwide standards to private causes of action arising under the Commodities Act is the only result consistent with the purposes and development of that Act and the intention of Congress to establish a strong regulatory scheme. Therefore, the Fifth Circuit's judgment denying the application of the nationwide process and jurisdictional standards in this matter is in error and should be reversed.

B. Supreme Court Interpretation of Commodities Act Supports Application.

The Fifth Circuit based its decision on the finding that the Commodities Act provides the only basis for plaintiffs' claims. Assuming *arguendo* that the Commodities Act provides a basis for plaintiffs' claims and further, the Act is the only basis of such claims, we believe that the appropriate standard for determining personal jurisdiction is the nationwide process and jurisdictional provisions of the Commodities Act itself.

The Fifth Circuit held that such provisions apply only to those actions taken by the Commodities Futures Trading Commission ("Commission"). Joint Appendix, pp. 41-42. In reaching this conclusion, the court failed to give

consideration to this Court's decision in *Merrill Lynch*. That case contains a careful and thorough study on the question of whether an implied right of action exists under the Commodities Act. This Court applied the traditional analysis enunciated in *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) for determining whether a private cause of action exists. In *Cort*, the Court noted that legislative intent is critical to such a determination. As this Court held:

> "In determining whether a cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted."

456 U.S. at 378, 72 L. Ed. 2d at 201.

It was found in *Merrill Lynch* that prior to the comprehensive amendments to the Commodities Act in 1974, a private cause of action had been routinely and consistently recognized to exist.

Importantly, this Court, by analogy, referred to the implied remedies found in the Securities Exchange Act of 1934. As observed:

> "The routine recognition of a private remedy under the CEA prior to our decision in *Cort v. Ash* was comparable to the routine acceptance of an analogous remedy under the Securities Exchange Act of 1934. . . . This court, as did other federal courts and federal practioners, simply assumed that the remedy was available."

456 US at 379-80, 72 L.Ed. 2d at 202.

Similarly, just as with the Securities Exchange Act, not only was an implied private right of action adopted,

but no distinction was drawn as to such private rights and administrative and governmental rights of action. We contend that the grant of jurisdiction and nationwide service of process found in the Commodities Act, e.g. 7 USC § 13a-1, applies in both private rights of action and in commission enforcement cases. This is a position which is consistent with consideration of legislative intent which *Cort* and *Merrill Lynch* demand.

The reasoning of this Court in *Merrill Lynch* is instructive. The Court recognized:

> "[T]hroughout the long history of federal regulation of future trading it has been federal law that has imposed a stringent duty upon exchanges to police the trading activities in the markets that they are authorized by statute to regulate. Since the amendments to the original legislation regulating futures trading consistently have strengthened that regulatory scheme, the elimination of a significant enforcement tool would clash with this legislative pattern. We therefore may not simply assume that Congress silently withdrew the pre-existing private remedy against exchanges."

456 U.S. at 393-94, 72 L. Ed. 2d at 210-11.

It is precisely because Congress intended to strengthen prohibitions against manipulations in commodities trading that any rule which limits service of process and personal jurisdiction to state forums and state law "clash(es) with this legislative pattern." Just as this Court noted, there is no basis for believing that state law will support enforcement of such a broad legislative scheme. *Merrill Lynch*, 456 U.S. at 393.

On the contrary, application of state long-arm statutes to commodities fraud actions would have the result of

imposing different standards of liability on the same action in different states. Congress clearly did not envision such a result when it passed the Commodities Act. The Supreme Court has held that there is an implied remedy under the Commodities Act and the purpose of that remedy is to support and strengthen the system of enforcement against commodities fraud. The Fifth Circuit's decision denying nationwide jurisdiction is contrary to this reasoning.

V. RULE 4(e) SHOULD NOT CONFINE FEDERAL JURISDICTION OVER ALIEN DEFENDANTS IN COMMODITIES FRAUD ACTIONS

The Fifth Circuit relied heavily on its decision in *DeMelo vs. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983), for the result in this case.[13] The focal point of the

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[13]First, we note that the Fifth Circuit relied extensively on its decision in *DeMelo vs. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983). The federal statutes discussed in *DeMelo* make no provision for service of process. The Commodities Act, on the other hand, provides for nationwide process. Recognizing this provision for service of process, the present matter is clearly distinguishable from *DeMelo*.

The Fifth Circuit in *DeMelo*, in discussing the subject matter jurisdiction of the court over Woolsey Marine Industries, Inc. ("Woolsey"), an out of state defendant in that case, found that the only basis for jurisdiction over Woolsey was *diversity*. *DeMelo*, 711 F.2d at 1262 n.1. The panel then proceeded to frame its discussion in the context of an action founded in part upon federal question jurisdiction. Thus, such a context was inappropriate and overly broad. The case against Woolsey was a diversity case, not federal question, and any discussion pertaining to the appropriate jurisdictional standards in federal question cases was dicta and not controlling.

DeMelo discussion relates to the statutory interpretation of Rule 4(e) of the Federal Rules of Civil Procedure which states:

> "Whenever a statute of the United States or an order of court thereunder provides for service . . . service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, . . . upon a party not an inhabitant of or found within the state, . . . service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

In interpreting this provision in the context of the case before the Court, we note the *DeMelo* panel relied upon the Fifth Circuit's decision in *Burstein v. State Bar of California*, 693 F.2d 511 (5th Cir. 1982) ("Burstein"). The panel in *Burstein* found that whenever a federal statute is silent as to service of process, the second sentence of Rule 4(e) requires that amenability to personal jurisdiction be found only under circumstances in which a Louisiana court can assert such jurisdiction. *Burstein*, supra at p. 523. Despite some support for the application of the *Burstein* principle to purely federal question cases, its application in this matter is inappropriate.

A federal court in a federal question case is not constitutionally bound by the Fourteenth Amendment in its exercise of personal jurisdiction. The *Burstein* panel even states as much in its decision. *Burstein*, *supra* at p. 523. In fact, absent some statutory restraint, the only relevant constitutional provision in federal question case pending in a

federal court is the due process clause of the Fifth Amendment to the United States Constitution. *Burstein*, at p. 523 n. 16; *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581 (5th Cir. 1982).[14] The Fifth Circuit in this matter has found that, under such Fifth Amendment standards, it has jurisdiction over Wolff and Gourlay. Record, Vol. 7, at p. 603.

The question remains then whether the *Burstein* statutory interpretation of Rule 4(e) should require the application of state long arm standards to a purely federal question case under the Commodities Act. We believe such application to the present matter is contrary to the purpose of federal question jurisdiction and the intent of Congress.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court hold that the governing standard in federal question cases involving foreign aliens is compliance with the Fifth Amendment.

At a minimum, we submit that the legislative history of the Commodities Exchange Act is such that nationwide service of process is necessary to comply with the enforcement regulations of the Act and, therefore, nationwide contacts

[14]The Fifth Circuit decided in *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581 (5th Cir. 1982), only eight days after its *Burstein* decision, that the sole test for amenability to jurisdiction in federal question cases is the due process clause of the Fifth Amendment. We agree with that Court's reasoning in *Lapeyrouse*.

should be adopted with regard to the Commodities Exchange Act. Certainly, we submit that the decision of the Fifth Circuit in requiring strict compliance with Rule 4 in order to obtain personal jurisdiction, as opposed to process, is erroneous and should be reversed.

Respectfully submitted,

ROBERT A. KUTCHER*
JOHN D. FRICKE
OF
BRONFIN, HELLER, STEINBERG
& BERINS
2500 Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 568-1888
Attorneys for Petitioners
*Counsel of Record

RESPONDENT'S

BRIEF

No. 86-740

In The
Supreme Court of the United States
October Term, 1986

OMNI CAPITAL INTERNATIONAL, LTD., ET AL.,
Petitioners,

vs.

RUDOLF WOLFF & CO., LTD., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Respondents in Support of Petitioners, Point Landing, Inc., Point Landing Fuel Corp., William S. and Ruby M. Smith, Dennis M. and Joan Rosenberg

ANITA M. WARNER
HURLEY AND HOFFMANN
925 Common Street
Suite 825
New Orleans, LA 70012
(504) 522-0807

Counsel for Respondents, Point Landing, Inc., et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

ARGUMENT

Respondents in Support of Petitioners, Point Landing, Inc., Point Landing Fuel Corp.,[1] William S. and Ruby M. Smith and Dennis M. and Joan Rosenberg herein adopt the brief of petitioners, Omni Capital International, Ltd., et al, by reference, as if copied *in extenso*.

———o———

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ANITA M. WARNER
HURLEY AND HOFFMANN

925 Common Street, Suite 825
New Orleans, Louisiana 70112
Telephone: (504) 522-0807

Attorneys for Respondents in Support of Petitioners

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[1]Point Landing, Inc., and Point Landing Fuel Corp., were merged and are now known as Wood Resources Corporation.

RESPONDENT'S

BRIEF

No. 86-740

IN THE

Supreme Court of the United States

October Term, 1986

OMNI CAPITAL INTERNATIONAL, LTD., et al.,

Petitioners,

v.

RUDOLF WOLFF & CO., LTD. and JAMES GOURLAY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT JAMES GOURLAY

JEROME LIPPER
Co-Counsel of Record
TRUBIN, GREENBLATT, FALLON & KAPLAN
405 Lexington Avenue
New York, New York 10174

SHELDON H. ELSEN
Co-Counsel of Record
CLEMENT J. COLUCCI
ORANS, ELSEN & LUPERT
One Rockefeller Plaza
New York, New York 10020
(212) 586-2211

MICHAEL S. FAWER, PLC
Co-Counsel of Record
530 Natchez Street
New Orleans, Louisiana 70130

Attorneys for Respondent James Gourlay

May, 1987

QUESTION PRESENTED

May a Louisiana federal court assert jurisdiction over an English defendant through service of process in London, when that defendant has had no contact with Louisiana and when the Louisiana long-arm statute does not grant jurisdiction, on the theory that the defendant had contacts with another of the United States and that contact with the country is sufficient, when the Commodities Exchange Act, under which suit was brought, does not provide for nationwide service of process for the kind of action brought, and when Rule 4, Federal Rules of Civil Procedure, therefore bars such an assertion of jurisdiction?

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JURISDICTION

The judgment of the Court of Appeals (Joint Appendix, pp. 26-67) was entered on July 25, 1986. The petition for a writ of certiorari was filed on October 20, 1986 and was granted on January 27, 1987. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

No. 86-740

IN THE

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October Term, 1986

OMNI CAPITAL INTERNATIONAL, LTD., et al.,

Petitioners,

v.

RUDOLF WOLFF & CO., LTD. and JAMES GOURLAY,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT JAMES GOURLAY

Respondent James Gourlay submits this brief and asks this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit entered July 25, 1986.

STATEMENT OF CASE

Respondent James Gourlay, an English commodities trader, was sued in Louisiana as a third-party defendant in private commodities actions, although Mr. Gourlay had had no contact with the State of Louisiana. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, held 15-0 that service of process in London did not provide jurisdiction over him under the Commodities Exchange Act, 7 U.S.C. §§ 1-26, regardless of claims about his aggregate contacts with the United States, because that statute did not provide for nationwide service of process in private actions. The Court of Appeals also held, by a margin of 9 to 6, that there was no jurisdiction over such a foreign defendant under Rule 4 of the Federal Rules of Civil Procedure because no statute provided nationwide service in these circumstances and the Louisiana long-arm statute concededly did not apply to him. The third-party plaintiffs petitioned this Court for a writ of certiorari, which was granted.

The relevant facts are as follows. The plaintiffs below had participated in an investment program that "involved the use of discretionary trading accounts to purchase and sell options and contracts in silver commodity futures traded on the London Metals Exchange." Order and Reasons: Motion to Dismiss, May 16, 1983 ("First District Court Opinion") (JA 6).* The tax benefits anticipated from this program did not materialize and the Internal Revenue Service disallowed the claimed tax losses. First District Court Opinion (JA 6).

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*Record references will be identified, then cited by page number of the Joint Appendix: "JA ___."

The disappointed investors sued the promoters of their investment program,* who in turn brought third-party complaints against the English commodities traders with whom they had worked, Mr. Gourlay and a London metals trading firm, co-respondent Rudolph Wolff & Co., as well as their accountants, Main, Hurdman & Co., who are not parties to this appeal,** Securities law claims were also brought, but were dismissed by the District Court on the grounds that securities actions here were pre-empted by the Commodities Exchange Act, a decision unanimously affirmed by the Court of Appeals *en banc*, after both the Securities Exchange Commission and Commodity Future Trading Commission had filed *amicus curiae* briefs urging that position. That holding was not challenged in the petition for certiorari and is not before this Court.

The District Court then held that the only proper test for jurisdiction was found in Rule 4, Fed. R. Civ. P., under which there was no jurisdiction over Mr. Gourlay or Rudolph Wolff & Co. It was this holding which was affirmed by the Court of Appeals *en banc* and which is the subject of this appeal.

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*These were three New York corporations: Omni Capital International, Ltd., Omni Capital Corporation, Northglen Capital Corporation, and their principal officers: Richard Friedberg, Michael Stern, and Barry Minsky.

**The individual actions vary in some details from this composite account. In one action brought by Point Landing, Inc. and Point Landing Fuel Corporation, the plaintiffs, pursuant to Supreme Court Rule 19.6, have submitted a brief in support of petitioners' position.

SUMMARY OF ARGUMENT

Personal jurisdiction, in a case of this sort, must be positively conferred by statute or rule; but applicable statutes and rules prohibit exercise of personal jurisdiction over Mr. Gourlay under these circumstances.* Rule 4(e) of the Federal Rules of Civil Procedure governs service of process, and thereby governs personal jurisdiction, in all cases not otherwise provided for. Rule 4(e) requires use of the Louisiana long-arm statute, which, concededly, does not confer jurisdiction over Mr. Gourlay. The Commodities Exchange Act, the only other possibly applicable statute, does not reach Mr. Gourlay. Both the language and history of the Commodities Exchange Act show that the Congress had no intention of providing nationwide service of process in private commodities fraud actions but chose to confine that type of process to actions brought by governmental agencies.

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*This Court, under authority delegated to it by the Congress under the Rules Enabling Act, 28 U.S.C. § 2072, could have promulgated an amendment to the Federal Rules of Civil Procedure permitting exercise of personal jurisdiction in a case like this. Nothing turns on whether Congressional authority is exercised directly by legislation or indirectly by rule, so in the interests of concise presentation we will not make any distinction between statutes or rules.

ARGUMENT

The District Court could not exercise personal jurisdiction in this case because no statute or rule empowered it to do so

A. The Federal Courts Cannot Exercise Personal Jurisdiction in the Absence of a Statute or Rule

"Federal courts are courts of limited jurisdiction. Their personal jurisdiction, no less than their subject-matter jurisdiction, is subject both to constitutional and to statutory definition." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 710 (1982) (Powell, J., concurring). The lower federal courts, being creatures of statute, can have no more jurisdiction—whether personal or subject-matter jurisdiction—than the Congress gives them. *Robertson v. Railroad Labor Board*, 268 U.S. 619 (1982); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."). They "have no warrant to create jurisdictional law of their own." *Insurance Corp. of Ireland*, *supra*, 456 U.S. at 711. So long, then, as no question of due process arises—and none arises here—"The question presented is one of statutory construction." *Robertson*, *supra*, 286 U.S. at 622.*

This principle, that "federal courts may exercise only so much of their Article III jurisdiction as they are granted by Congress," provided the foundation for the *en*

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*The question here is whether Congress has legislated—which it has not—and not whether legislation conferring jurisdiction would pass muster under a due process test. This Court has never decided whether "aggregate contacts" jurisdiction comports with due process, *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 55 U.S.L.W. 4191, 4197, n* (1987), and the issue is not presented here, even though respondents devote much of their argument to proving that Fifth Amendment due process standards, rather than Fourteenth Amendment due process standards, control in federal question cases.

banc decision of the Court of Appeals in this case. *Point Landing, Inc. v. Omni Capital International, Ltd.*, 795 F.2d 415, 423 (5th Cir. 1986) (JA 40).

A federal district court cannot exercise personal jurisdiction unless it has both constitutional power and statutory competence.* That is fundamental. *See Restatement (Second) of Judgments* § 4, comment f (1982). Petitioners disagree. The explicit premise of petitioners' argument, and the necessary logical foundation of Judge Wisdom's dissent, is that: "In federal question cases, the sole test of amenability to jurisdiction [is] the test of constitutionality." (Pet. Brief, p. 12).

But the Constitution does not, of its own force, create inferior federal courts. The Congress decides whether to create them. The Constitution does not, of its own force, endow inferior federal courts, once created, with subject-matter jurisdiction. The Congress decides, within constitutional limits, their subject-matter jurisdiction. *Lockerty v. Phillips*, 319 U.S. 182 (1943).

The Constitution does not, of its own force, endow inferior federal courts with personal jurisdiction either, and petitioners cannot cite a constitutional provision that even arguably does so. Instead, petitioners assert that: "Personal jurisdiction is not a creature of Congress; it represents the exercise by an individual defendant of his constitutionally guaranteed right to due process." (Pet. Brief, p. 11). This assertion is unsupported by authority or reason. What petitioners must mean is that the fed-

*Professor Thomas Green, credited with formulating the "aggregate contacts" test (JA 64), wrote: "There must be judicial jurisdiction in the forum from which the court derives its authority. There must be statutory competence, *i.e.*, an empowering of the court to hear this controversy from the legislature." Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 Vand. L. Rev. 967, 968 (1961). Although Professor Green favored "aggregate contacts" jurisdiction, he recognized that legislation would be necessary before a federal court could assert it. *Id.* at 981.

eral courts have inherent power to assert personal jurisdiction to the outermost limits of due process, a proposition that "has never been asserted, and could not be defended with any show of reason." *Sheldon v. Sill*, *supra*, 49 U.S. (8 How.) at 449.*

Indeed, under petitioners' theory every federal district court, be it the Southern District of Florida or the District of Alaska, must have jurisdiction over every American citizen or resident, every corporation incorporated in any state, or every person with any significant contact with any part of the nation. This cannot be the law, absent some positive declaration by the Congress.

Petitioner's theory ignores precedent, nearly two centuries of practice, and serious practical difficulties.

B. Rule 4(e) Requires Use of the Louisiana Long-Arm Statute

No federal statute "prescribe[s] general and comprehensive jurisdictional regulations for the federal courts." von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1124 n. 6 (1966). Consequently, within constitutional limits, personal jurisdiction in the federal courts has been regulated indirectly, by regulating service of process. *Insurance Corp. of Ire-*

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*Petitioners seem to concede that the Congress could limit the personal jurisdiction of the federal courts by affirmative legislation. That, at least, seems to be the meaning of the statement: "absent some statutory restraint, the only relevant constitutional [?] provision in [a] federal question case pending in a federal court is the due process clause of the Fifth Amendment." (Pet. Brief, pp. 35-36). Though analytically backward, this view would equally require affirmance, since Mr. Gourlay would be excluded by the affirmatively legislated limit of Rule 4(e). The affirmative limit of Rule 4(e), moreover, means that this situation is quite different from that where Rule 4 is silent on an unusual set of facts, which the Rule may have failed to address, as in *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir. 1966) (JA 55-56), relied on by the dissent. Here, the assertion of jurisdiction would be *inconsistent* with Rule 4, and thus the *Petrol Shipping* court could not have asserted jurisdiction. 360 F.2d at 108 (JA 56).

land, *supra*, 456 U.S. at 715 n. 6. *Cf.* New York Civil Practice Law & Rules, §§ 301, 302 (McKinney's 1972) (setting out bases for exercise of jurisdiction by New York State courts); La. Rev. Stat. § 13:320, (same: Louisiana long-arm statute).

This has been the procedure since the Judiciary Act of 1789, which extended the reach of the federal district courts' process to the limits of their respective districts, consistent with common law practice. Act of September 24, 1789, ch. 20, § 11, 1 Stat. 73, 79. *See also*, Barrett, *Venue and Service of Process in the Federal Courts: Suggestions for Reform*, 7 Vand. L. Rev. 608, 609-12 (1954). That procedure remains largely unchanged, except that now district court process normally extends throughout the entire state in which the district court sits. Fed. R. Civ. P. 4(f).

Generally, Rule 4 of the Federal Rules of Civil Procedure governs service of process in the federal courts. As the Court of Appeals recognized, "'Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained.'" 795 F.2d at 424 (JA 43), *quoting Insurance Corp. of Ireland*, 456 U.S. at 715 n.6 (Powell, J., concurring). Various federal statutes contain their own special service of process provisions, *see* 2 J. Moore, *et al.*, *Moore's Federal Practice* ¶4.42 [2.-1] (1986) for examples, "[b]ut the norm, even in federal question cases, remains that imposed by the provisions of Rule 4." P. Bator, *et al.*, Hart & Wechsler's *The Federal Courts and the Federal System*, p. 1108 (2d ed. 1973).

Since no special statute addresses service of process in private CEA actions, *see* Part D *infra*, the relevant service of process provision is Rule 4(e) of the Federal Rules of Civil Procedure, which provides:

> *Summons: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the

United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case by made *under the circumstances and in the manner* prescribed in the statute or rule.

(Emphasis added)

This language is as clear as can be. When no other federal statute provides for service of process, Rule 4 governs. When the defendant is not within the forum state, Rule 4(e) says the forum's long-arm statute governs. When the forum state's long-arm statute governs, service must be made "under the circumstances" in which that long-arm statute permits assertion of jurisdiction. That, in turn, requires that the defendants have sufficient contacts with the *forum state* to be within reach of the statute.

The vast majority of cases support this conclusion, as did the 9-6 majority of the *en banc* court below. *See, e.g., Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, __ U.S. __, 106 S. Ct. 383 (1985); *Handley v. Indiana & Michigan Electric Co.*, 732 F.2d 1265 (6th Cir. 1984); *Webber v. Michela*, 633 F.2d 518 (8th Cir.

1980); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977). So too does the vast majority of scholarly commentary. Whether or not the author would prefer a different rule, these scholars agree that the rule in effect so provides. In addition to Professor Green, p.6, *supra*, *see*, 4 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1075 (Supp. 1977); Smith, *No Forum at All or Any Forum You Choose: Personal Jurisdiction Under the Antitrust and Securities Laws*, 39 Bus. Law. 1685, 1688-91 (1984); Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 Tulane L. Rev. 758, 785-86 (1984); Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 117 (1983); Berger, *Acquiring in Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 Utah L. Rev. 285, 335-37 (1982); Note, *National Contacts As a Basis for In Personam Jurisdiction Over Aliens in Federal Question Suits*, 70 Cal. L. Rev. 686, 699 (1982); Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv. L. Rev. 470, 485 (1981); von Mehren & Trautman, *supra*, 79 Harv. L. Rev. at 1124 n. 6. *See also American Law Institute Study of Division of Jurisdiction Between State and Federal Courts*, § 1341(d) (1969), suggesting a federal long-arm statute for federal question cases; Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 Wis. L. Rev. 7 (1969); Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 Wash. & Lee L. Rev. 185 (1969); Currie, *The Federal Courts and the American Law Institute II*, 36 U. Chi. L. Rev. 268 (1968).

Petitioners' answer is to appeal for a change of policy. But that appeal must be directed to the Congress, which has chosen to allocate jurisdiction in accordance with its own decisions on national priorities, which do not necessarily suit the convenience of these plaintiffs. Nor may such an appeal be made to the courts, which must implement the Congress' allocations of jurisdiction, not

supersede them. The lonely decision relied on by the dissent below, *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975), (which does not even refer to Rule 4(e)), illustrates one judicial effort to overcome the restraints of judicial deference to the Congress on matters of jurisdiction, but its failure to persuade so many other judges and scholars shows how far removed that case was from our traditions and generally accepted notions of where jurisdictional allocations should properly be made.

C. The Desire for Uniform Administration of Federal Law Does Not Justify Judicial Enactment of a Federal Long-Arm Statute

Petitioners' main argument for ignoring the clear dictates of Rule 4(e) is that use of state long-arm statutes undermines the uniform administration and enforcement of federal law. The inferior federal courts, they assert, "were established to zealously and uniformly apply, protect, and enforce federal rights." (Pet. Brief p. 24).* Reliance on state long-arm statutes for personal jurisdiction in federal question cases means, therefore, that the enforceability of federal rights may vary from state to state.

But whether there should be uniformity or whether the federal courts should rely on state law is a matter for the Congress to decide; the Congress frequently decides to condition important federal rights on the requirements of state law, regardless of the effect on uniformity.

The Congress has done this most often, perhaps, with statutes of limitations. The Congress often does not

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*This assertion is difficult to square with historical fact. As is well known, with a few exceptions, *see* P. Bator, *et al.*, Hart & Wechsler's *The Federal Courts and the Federal System*, pp. 844-47 (2d ed. 1973), the federal courts did not even have federal question jurisdiction for the first 86 years of their existence. Act of March 3, 1875, § 1, 18 Stat. 470.

enact a statute of limitations when it enacts a law. In such a case, the most analogous state statute applies. *See, e.g., Wilson v. Garcia*, __ U.S. __, 105 S. Ct. 1938 (1985) (collecting cases). Surely reliance on state statutes of limitations in federal question cases means that the enforceability of federal rights may vary from state to state, but this lack of uniformity would not authorize this Court to legislate uniform statutes of limitations in federal question cases. This Court has no greater authority to enact a federal long-arm statute.

If petitioners are correct, moreover, that the federal courts inherently possess all the personal jurisdiction compatible with due process, they must have it in *all* federal question cases. Although this particular case involves an alien defendant, there is no principled basis for restricting petitioners' theory to cases involving aliens. Thus, petitioners would create a scheme with no territorial limits on federal court jurisdiction of federal question cases. Such a scheme would not only violate the express language of Rule 4(e), but would create a radical new form of federal court jurisdiction without regard to a long history of Congressional regulation.

The Court of Appeals correctly ruled that it lacked authority to manufacture its own jurisdiction when the Congress has not acted. This Court should, therefore, affirm.

D. The CEA Does Not Provide For Nationwide Service of Process

In the alternative, petitioners rely on the CEA to provide statutory competence to assert jurisdiction over Mr. Gourlay, a theory the Court of Appeals unanimously rejected. Petitioners state that "With few exceptions, whenever Congress provided judicial resort for enforcement of the Commodities Act, provisions were consistently made for nationwide process and jurisdiction." (Pet. Brief, p. 28). The "few exceptions," however, include this case,

brought by private parties asserting claims under the CEA.

Section 13a-1 of the CEA, 7 U.S.C. § 13a-1, expressly authorizes nationwide service of process in actions brought by the CFTC, or by the Attorney General at the CFTC's request. Section 13a-2, 7 U.S.C. § 13a-2, authorizes nationwide service of process in actions brought by state attorneys-general. Section 18(d), 7 U.S.C. § 18(d), authorizes nationwide service of process in actions brought by private parties to enforce CFTC orders made on their behalf.

In contrast, section 25, 7 U.S.C. § 25, which authorizes private actions for violations of the CEA, makes no provision for nationwide service of process. The jurisdictional provision of § 25 states in its entirety:

> (c) Jurisdiction
>
> The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action must be brought within two years after the date the cause of action accrued.

7 U.S.C. § 25(c).

In the face of this plain statutory language, petitioners cannot seriously argue that anything in the terms of the CEA provides for nationwide service of process in private CEA actions.* Instead, they suggest similarities between some aspects of the CEA and some aspects of the federal securities ' ws, from which they attempt to

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* The only other authority on point holds that "the CEA has no . . . nationwide service of process provisions" with respect to private CEA claims. *Gravois v. Fairchild, Arabatzis, et al.*, [1977-1980 Transfer Binder] CCH Comm. Fut. L. Rep. ¶20,706 at p. 22,875 (E.D. La. 1978). *See also Shelley v. Noffsinger*, 511 F. Supp. 687 (N.D. Ill. 1981); *Gould v. Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972) (holding that subject matter jurisdiction was conferred by 28 U.S.C. § 1337, which also lacks provision for nationwide service of process).

engraft onto the CEA the nationwide service of process provisions contained in the securities laws. (Pet. Brief, pp. 28-30).

A comparison of the actual statutory language in the federal securities laws with the CEA disposes of the purported analogy and shows as well that the Congress knows how to provide for nationwide service of process when it wants to. Section 27 of the Exchange Act, 15 U.S.C. § 78 aa, provides:

> § 78aa. Jurisdiction of offenses and suits
>
> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, *and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder*. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. *Any suit or action to enforce any liability or duty created by this chapter* or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, *may be brought in any such district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found*.

15 U.S.C. § 78aa (emphasis added).

Unlike section 13a-1 of the CEA, therefore, section 27 of the Exchange Act explicitly provides nationwide service of process for "*[a]ny* suit or action to enforce *any* liability or duty under this chapter." The Congress had this simple model available to it when drafting the service of process provisions of the CEA, yet it chose a more

complex, particularized drafting style specifying exactly which actions had the benefit of nationwide service of process.

Indeed, as the legislative history of the CEA shows, commodities trading presents many different policy issues from securities trading. *See*, Johnson, *The Commodities Futures Trading Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1 (1976). Commodities have traditionally been traded on the basis of standardized contracts in specialized markets, unlike securities, where complex internal information about companies is traditionally spread widely to a vast array of investors who receive it in many places and rely on it. The CFTC can act nationally in appropriate commodities cases, but the Congress did not consider it wise or necessary to permit private suits all over the country against commodities traders in other parts of the country or the world.

The legislative history of the 1982 amendments to the CEA, which were written for the very purpose of dealing with the jurisdictional and procedural aspects of private CEA actions left open after this Court implied a private right of action in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982), did not extend nationwide service of process to private actions, but left such service only for CFTC and other government actions. The Congress focused expressly on the issue and decided against petitioners' position.

Thus, the House Committee on Agriculture projected that

> [the CFTC and self-regulatory agencies] will vigorously use the tools at its [sic] command to protect the investing public *so that it does not become neces-*

sary to rely on private litigants as a policeman of the Commodity Exchange Act.

House Report No. 97-565 Part I, p. 57 (1982) (emphasis added).

In its treatment of procedural issues for CEA private rights of action, the Congress provided a relatively short, two-year statute of limitations for private commodities fraud actions, 7 U.S.C. § 25(c), and made non-substantive changes in 13a-1 and § 18(d) and substantial changes in § 13a-2, which contain the only nationwide service of process provisions in the CEA, 7 U.S.C. §§ 13a-1, 13a-2, 18(d), but did not see fit to enact either a specific nationwide service of process provision for private actions under § 25, 7 U.S.C. § 25, or a general nationwide service of process provision applicable to all CEA actions, such as that in § 27 of the Exchange Act, 15 U.S.C. § 78aa. The only rational explanation for the language and history of the CEA, then, is that the Congress meant what it said: nationwide service of process is to be available in the cases specified and only in those cases, i.e., governmental actions.

Petitioners further argue that the Congress had a broad remedial purpose in enacting the CEA and permitting private CEA actions, and that the implication of nationwide service of process is necessary to effectuate this purpose. Petitioners advance two points to support this argument. The first is a matter of legislative policy properly addressed to the Congress. The second is a matter of legal argument, properly addressed to this Court, but it is unsound.

Petitioners' first point is that "Congress recognized the need for a strong and expansive regulatory scheme in the area of futures trading." (Pet. Brief, p. 29). From this incontestable premise petitioners contend that every "significant enforcement tool" under the CEA "must be given the same dignity as other 'tools.'" (Pet. Brief, p.

29). This "dignity" principle, in turn, requires that nationwide service of process be extended to private CEA actions, whether the Congress provided for it or not. (Pet. Brief, p. 29).

This amounts to nothing more than a contention that this Court should imply nationwide service of process in private CEA actions, regardless of the clear terms of the statute, because commodities regulation is important. Courts, however, cannot rely on such considerations to extend their personal jurisdiction in the absence of clear statutory authority. In cases arising under a variety of important federal laws, courts have refused to consider the importance of the laws involved as a basis for justifying judicial legislation of a federal long-arm statute. *See, e.g., Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 383 (1985) (patent laws); *Webber v. Michela*, 633 F.2d 518 (8th Cir. 1980) (civil rights laws); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977) (trademark laws); *Central Operating Co. v. Utility Workers of America, AFL-CIO*, 491 F.2d 245 (4th Cir. 1974) (labor laws); *Bernard v. Richter's Jewelry Co.*, 53 F.R.D. 606 (S.D.N.Y. 1971) (truth-in-lending laws); *Interstate Commerce Commission v. Agricultural Cooperative Ass'n*, 34 F.R.D. 497 (S.D. Iowa 1964) (Interstate Commerce Act).

The Congress decides what federal policies are important, how important they are, and how they are to be implemented. Petitioners cannot second-guess such legislative determinations in this Court, which has consistently rejected such attempts to have it undercut the jurisdictional policy decisions made by Congress.

Petitioners' second point is that this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) requires nationwide service of process in CEA actions. In part, this point is a rehash of the policy recommendations that constitute petitioners' first point.

The purely legal argument, however, is that this action arose not under § 25 of the CEA, which did not then exist, but under the *Curran* regime. At the time of the *Curran* decision, "all other civil actions [*i.e.*, CFTC actions, actions by state attorneys-general, and private actions to enforce CFTC orders] provided under the Commodities Act permitted nationwide service of process." (Pet. Brief, p. 29). Therefore, petitioners argue, *Curran* must be taken to mean that the CEA's nationwide service of process provisions applied to the implied private actions as well.

This Court, however, said nothing at all in *Curran* about service of process. Furthermore, it does not follow from recognition of an implied private right of action that it is governed by the the jurisdictional provisions of the CEA expressly enacted for government actions. The implied rights of action under the Exchange Act, to which petitioners refer, could rely on § 27 for nationwide service of process because it explicitly covered *all* actions under the Exchange Act. Given the very different and explicitly limited provisions in the CEA, courts recognizing implied private actions, including the District Court below, relied on 28 U.S.C. § 1337, which creates jurisdiction over actions based on a statute regulating interstate commerce. *Point Landing, Inc., et al. v. Omni Capital International, Ltd., et al.*, Civ. No. 80-677, 81-590, - 1996, - 4695 (E.D. La. December 12, 1983) (JA 20); *Shelley v. Noffsinger*, 511 F. Supp. 687 (N.D. Ill. 1981); *Gould v. Barnes Brokerage Co.*, 345 F. Supp. 294 (S.D. Tex. 1972). Since § 1337 contains no special service of process provision, those courts relied on Rule 4 and their state long-arm statutes.

In addition, when Congress codified jurisdictional and procedural provisions for CEA private rights of action after *Curran*, in 1982, as shown above, it left nationwide service of process for governmental actions and did

not extend it to the private rights of action recognized by *Curran*.

This Court's decision in *Curran*, therefore, does not support petitioners' claims. The CEA means what it says and does not provide for jurisdiction over Mr. Gourlay. No other statute or rule provides for such jurisdiction The District Court and the Court of Appeals both correctly held that the District Court lacked statutory competence to assert personal jurisdiction over Mr. Gourlay.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

SHELDON H. ELSEN
Co-Counsel of Record
ORANS, ELSEN & LUPERT
One Rockefeller Plaza
New York, New York 10020

Of counsel:
SHELDON H. ELSEN
CLEMENT J. COLUCCI

JEROME LIPPER
Co-Counsel of Record
TENZER, GREENBLATT,
FALLON & KAPLAN
405 Lexington Avenue
New York, New York 10174

Of counsel:
JEROME LIPPER

MICHAEL S. FAWER, PLC
Co-Counsel of Record
530 Natchez Street
New Orleans, Louisiana 70130

Of counsel:
MICHAEL S. FAWER

Counsel for Respondent
James Gourlay

personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature." 556 F.2d at 416; *see also Johnson Creative Arts, Inc.* v. *Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984) (Federal Rules of Civil Procedure and other Congressional mandates limit the exercise of personal jurisdiction in federal question cases); 2 J. Moore, J. Lucas, H. Fink & C. Thompson, *Moore's Federal Practice* ¶ 4.02[3] at 4-67 (1986) ("the federal district courts may only issue process for service within the territorial limits validly authorized by a federal statute or the Federal Rules . . ."); J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 3.18 at 161 (1985) ("Under existing law the process of each federal court is bounded by the territory of the state in which it sits, absent a federal statute or rule extending or contracting the jurisdictional reach of the federal courts, or an applicable state statute that does so."); Lilly, *Jurisdiction Over Domestic And Alien Defendants*, 69 Va. L. Rev. 85, 123-29, 132-40 (1983) (even if there is a basis for personal jurisdiction over an alien defendant that satisfies the due process clause of the Fifth Amendment, a legislative grant of authority is necessary before jurisdiction may be exercised); Cohen, *In Personam Jurisdiction Over Foreign Corporations: The Need for a Federal Long-Arm Statute*, 14 Den. J. Int'l L. & Pol'y 59, 70 (1985) (hereinafter "Cohen, *In Personam Jurisdiction*") (criticizing the national contacts jurisdictional theory on the ground that it "ignore[s] the requirement of a statutory authorization for in personam jurisdiction . . .").

Thus, Petitioners' contention that the personal jurisdiction of federal courts is limited only by the Fifth Amendment is at odds with an overwhelming body of legal authority. Moreover, Petitioners' position is inconsistent with Congressional action and experience concerning the jurisdiction of federal courts. Congress knows how to write jurisdictional legislation and has in the past enacted statutes which specifically authorize federal courts to exercise personal jurisdiction over non-resident defendants. For example, nationwide personal jurisdiction provisions appear in the Federal Interpleader Act, 28 U.S.C. § 2361; federal antitrust legislation, 15 U.S.C. §§ 5, 22, 25; federal

securities laws, 15 U.S.C. §§ 77v(a), 78aa; and in legislation regulating suits against federal officials, 28 U.S.C. § 1391(e); *see also* Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U. L. Rev. 3, 63-71 (1984) (hereinafter, "Fullerton, *Constitutional Limits*"). Both experience and logic belie Petitioners' theory that federal courts have the inherent power to exercise personal jurisdiction to the limits of the Fifth Amendment without statutory authorization since, under their theory, all federal legislation specifically providing for nationwide service of process would be entirely superfluous.[8]

It is clear that a federal district court in Louisiana may exercise personal jurisdiction over a nonresident defendant such as Wolff only if Congress has so provided by statute or in the Federal Rules of Civil Procedure. This "unmalleable principle of law" was the basis for the Fifth Circuit's jurisdictional holding.[9] *Point Landing IV*, 795 F.2d at 423 (Joint Appendix at 40). As will be demonstrated in Points II and III *infra*, neither the CEA nor Rule 4(e) of the Federal Rules of Civil Procedure provides a basis for the exercise of personal jurisdiction over Respondent Wolff in this case.

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8 Petitioners contend that "absent some statutory restraint, the only relevant constitutional provision in [a] federal question case pending in a federal court is the due process clause of the Fifth Amendment to the United States Constitution." (Pet. Br. at 35-36). However, "in the realm of *in personam* jurisdiction, statutes do not serve principally to restrain inchoate judicial power; rather, they bestow authority where none otherwise exists." Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. at 139.

9 Petitioners' failure to recognize that the personal jurisdiction of federal courts is determined not only by the United States Constitution but also by the Federal Rules of Civil Procedure and federal statutes has apparently led them to misconstrue the decision below. While Petitioners suggest that the Fifth Circuit's ruling was based on an improper application of Fourteenth Amendment due process standards (Pet. Brief at 15 n.8, 18, 21), the majority opinion in fact rests on a sound construction of the CEA and Federal Rule of Civil Procedure 4(e).

II.

THE CEA DOES NOT AUTHORIZE NATIONWIDE SERVICE OF PROCESS FOR PRIVATE CAUSES OF ACTION

Petitioners concede that the CEA does not explicitly authorize nationwide service of process for private causes of action. Indeed, Petitioners at one point admit that a search for statutory authorization of personal jurisdiction would be "futile." (Pet. Br. at 11). Nevertheless, Petitioners argue that a nationwide standard of amenability to personal jurisdiction for private claims is "appropriate," and can be implied from (1) the fact that a private cause of action can be brought under the CEA; (2) the provision of nationwide service of process in the CEA for claims brought by the CFTC and state attorneys general; and (3) the regulatory goals of the CEA, by analogy to § 27 of the Securities Exchange Act, 15 U.S.C. § 78aa. This argument of "personal jurisdiction by implication" should be rejected by the Court. Petitioners' subjective views of "appropriateness" aside (Pet. Br. at 28), both the language of the CEA and the legislative history thereof indicate that Congress did not intend to provide nationwide service of process to private litigants.

A. Nationwide Service of Process Cannot Be Implied from the Existence of Private Claims Under the CEA

Prior to Congressional enactment of an express private right of action provision in § 22 of the CEA, 7 U.S.C. § 25, this Court in *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353 (1982), recognized an implied private right of action under the CEA. Petitioners contend that the Court's reluctance in *Curran* to rely on state law for commodities fraud regulation and the Court's acknowledgement of the importance of private claims as a "significant enforcement tool" under the CEA indicates that a nationwide amenability standard of personal jurisdiction should apply to private claims. Petitioners further argue that because *Curran* draws no distinction between private and governmental actions, the same personal jurisdiction

standard should be used for both types of claims. (*See* Pet. Br. at 29, 33).

Petitioners' analysis of *Curran* improperly confuses personal and subject matter jurisdictional concepts; *Curran* recognized an implied private right of action under the CEA—a holding which addresses the extent of a federal court's *subject matter* jurisdiction under a federal statute. Questions of personal jurisdiction and service of process were not even remotely at issue in *Curran*, and the fact that the opinion draws no distinction between private and governmental actions does not indicate, as Petitioners suggest, that the Court intended to create nationwide service of process for private claims. Moreover, the Court's discussion of state law in *Curran* concerned only the scope of substantive remedies that would be available to a commodities fraud plaintiff in the absence of an implied right of action under the CEA, not the extent of personal jurisdiction to be exercised by a federal court hearing such an implied private cause of action. Thus, the *Curran* decision does not provide any authority for implying nationwide service of process for private claims under the CEA.[10]

Petitioners' reliance on the express private right of action provision in the CEA, added by the Futures Trading Act of 1982, is similarly misplaced. The fact that following the *Curran* decision, Congress enacted an express private right of action

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10 Petitioners' commingling of personal and subject matter jurisdiction is evident in their argument that the Fifth Circuit's decision below is contrary to this Court's assessment in *Curran* of the importance of private claims under the CEA. In affirming the district court's dismissal of claims against the alien defendants, the court below merely ensured that *in personam* jurisdiction is properly obtained before subject matter jurisdiction under the CEA is exercised. Petitioners likewise confuse standards of liability under the CEA with standards of personal jurisdiction when they assert that "application of state long-arm statutes to commodities fraud actions would have the result of imposing different standards of liability on the same action in different states." (Pet. Br. at 33-34). Standards of liability under the CEA will remain constant; it is only the exercise of personal jurisdiction that may vary according to the relevant jurisdictional facts and the applicable state long-arm statute.

provision in § 22 of the CEA, 7 U.S.C. § 25, and provided that such claims be brought exclusively in federal court, again bears only on the issue of subject matter jurisdiction, and not on the assertion of *in personam* jurisdiction in cases brought pursuant to that section of the CEA. As the Ninth Circuit has observed, "[N]ot all federal statutes which grant a federal right to recovery and provide for suit in federal court contain an additional provision granting such broad service of process powers." *Wells Fargo* v. *Wells Fargo Express Co.*, 556 F.2d at 418.

B. Nationwide Service of Process for Governmental Enforcement Actions Under the CEA Does Not Apply to Private Claims

As a second argument for implying nationwide service of process for private claims under the CEA, Petitioners contend that the grant of nationwide service of process for governmental enforcement actions under § 13a-1 of the Act "applies in both private rights of action and in commission enforcement cases." (Pet. Br. at 33). According to Petitioners, it is necessary to imply the grant of nationwide service of process for private claims under the CEA so that private actions will have the "same dignity" as governmental enforcement actions. (Pet. Br. at 28-29). Both the legislative history of the CEA as well as principles of statutory construction mandate a rejection of this jurisdictional "cross-over" argument.

1. Congress Did Not Intend to Provide Nationwide Service of Process for Private Claims Under the CEA

The legislative history of the Futures Trading Act of 1982, specifically the portion concerning the House proposal setting forth an express private right action under the Act, indicates that Congress did not intend to rely on "private litigants as a policeman of the Commodity Exchange Act." (H. R. Rep. No. 565, 97th Cong., 2d Sess. 57, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3871, 3906). Rather, the proposed provision for private rights of action was intended to be a supplemental remedy, not a substitute for the regulatory and

enforcement program of the CFTC. *Id.* Thus, viewing the private action as a collateral remedy, it is not surprising that Congress did not include a provision for nationwide service of process in § 22 of the CEA.[11]

In contrast, the 1974 amendments to the CEA, which provide for enforcement actions by the CFTC, state attorneys general and private parties seeking to enforce a CFTC ruling in their favor, all expressly provide for nationwide service of process. 7 U.S.C. §§ 13a-1, 13a-2, 18(d). The Fifth Circuit reviewed the legislative history of the CEA and concluded that Congress did not intend to provide the same wide scope of personal jurisdiction to private litigants as it had provided to the regulatory bodies:

> [T]he clear language of §§ 13a-1, 13a-2 and 18(d) demonstrates that Congress knows how to provide for nationwide service of process. The more likely inference to draw from the Congressional silence is that Congress omitted that language from § 25 because it did not intend to permit nationwide service of process. Even though private actions are a "significant enforcement tool," *Curran*, 456 U.S. at 304, 102 S. Ct. at 1847, there is a rational governmental basis for limiting service of process in private suits while giving wide powers to those government regulatory bodies charged with primary responsibility for developing and enforcing regulatory policy.

Point Landing IV, 795 F.2d at 423 (Joint Appendix at 41-42); *see also Grosser* v. *Commodity Exchange, Inc.*, 639 F. Supp. 1293, 1305 & n.10 (S.D.N.Y. 1986) ("The parties agree that since the CEA does not provide for nationwide service of process in a private civil action, *compare* CEA § 6C, 7 U.S.C. § 13a-1 (governing injunctive actions by the Commodities Futures Trading Commission), whether personal jurisdiction

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11 Petitioners note that "with few exceptions" whenever Congress provided for judicial enforcement of the CEA, provision was consistently made for nationwide service of process. (Pet. Br. at 28, 30). The private right of action provision in the CEA, as Petitioners well know, is one of those exceptions.

exists over [the defendant] as to the CEA claims asserted against it must be determined by reference to state laws governing the assertion of personal jurisdiction over non-domiciliaries"); A.R. Bromberg & L.D. Lowenfels, *Securities Fraud & Commodities Fraud* § 4.6(463), at 82.373 (1984) (In contrast to the generous venue and service of process sections of the securities laws, these matters for private claims under the CEA are left to general venue and service provisions like 28 U.S.C. §§ 1391-1393 and Fed. R. Civ. P. 4(e),(f)).

Therefore, contrary to Petitioners' assertion that the Fifth Circuit has improperly imposed jurisdictional limitations on private actions under the CEA (*see* Pet. Br. at 24), it is *Congress* which imposed the limitations by declining to provide nationwide service of process for such private claims. It should be remembered that Congress declined to provide nationwide service for private claims, premised on its decision not to rely on "private litigants as a policeman of the Commodity Exchange Act." H.R. Rep. No. 565, 97th Cong., 2d Sess. 57, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3871, 3906. If Congress intended to provide private litigants with nationwide or extraterritorial service of process,[12] it would be a simple matter to amend the CEA to include such a service of process provision for private claims. Barring such an amendment, however, there is no legislative authority in the CEA for the judicial creation of a federal long-arm statute sought by Petitioners herein.

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12 Congress recently recognized the need for caution and restraint in authorizing extraterritorial service of process upon foreign citizens when it passed the Futures Trading Act of 1986, P.L. 99-641. This Act amended the CEA to authorize service of CFTC pre-complaint investigatory subpoenas outside the territorial limits of the United States upon the prior approval of a majority of the CFTC Commissioners. *See* 7 U.S.C. § 15. The legislative history of the Act reveals that Congress was wary of even this limited grant of extraterritorial jurisdiction to the specially-created federal agency responsible for regulating the commodities markets. The Conference Committee Report states:

(Footnote continued on following page)

Moreover, while Petitioners assert that the Fifth Circuit's decision "renders the private action under the CEA impotent to address the alleged violations of federal law" (Pet. Br. at 17), Wolff submits that Petitioners have a forum available for their claims in Great Britain. Contrary to the suggestion by Judge Wisdom in his dissenting opinion below that a court in Great Britain would not look "kindly" on a suit to enforce the United States securities laws, 795 F.2d at 431 (Joint Appendix at 59), there is no reason to presume that a British forum would be hostile to Petitioners' claims. Indeed, a British forum would be particularly appropriate given that the present con-

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(Footnote continued from previous page)

> The conferees intend that the Commission not routinely serve subpenas abroad. It is further the intention of the conferees that the Commission, when exercising its authority to serve subpenas, take into consideration the implications of such service on the broader foreign policy objectives of the United States. The conferees expect the Commission to find means of obtaining information in a way that seeks to avoid offending other nations and to consult with representatives of the receiving nation through the Department of State with a view toward minimizing any perceived intrusion on the sovereignty of that nation, where practicable and appropriate.

H. Conf. Rep. No. 995, 99th Cong., 2d Sess. 22, *reprinted in* 1987 U.S. Code Cong. & Admin. News 6066, 6067; *see also* H. R. Rep. No. 624, 99th Cong., 2d Sess. 19, *reprinted in* 1987 U.S. Code Cong. & Admin. News 6005, 6020 ("The Commission has assured the Committee that it is sensitive to the issues raised by foreign governments and foreign exchanges with respect to this authority and that it desires to exercise the authority in a way that will take those concerns into consideration.") In view of the caution exhibited by Congress in conferring extraterritorial subpoena power on the CFTC, it is not surprising that Congress was even more restrictive in defining the scope of personal jurisdiction under the CEA where a private party—rather than a governmental agency—is the plaintiff. Congress simply cannot be assured that private parties will exercise proper restraint in their dealings with alien defendants residing abroad.

Moreover, Petitioners' argument that the CEA implicitly authorizes the exercise of jurisdiction over Respondent Wolff ignores the fact that Congress has had *three* clear opportunities to provide for extraterritorial personal jurisdiction in private suits under the CEA. It is surely significant that neither the 1974 Commodity Futures Trading Commission Act, the 1982 amendment creating an express private right of action, nor the recently enacted Futures Trading Act of 1986 contains such a jurisdictional provision.

troversy involves transactions executed exclusively in London pursuant to LME contracts, governed by the rules of the 111 year old LME and custom and usage in LME trading, with all transactions priced in British pounds sterling.

2. Implication of Nationwide Service of Process Is Contrary to General Principles of Statutory Construction

Petitioners' argument that the nationwide service of process provision in § 13a-1 should be applied to private claims under § 22 is not only contradicted by the legislative history of the CEA, but also runs afoul of well-established principles of statutory construction. As this Court stated in *Russello* v. *United States*, 464 U.S. 16 (1983), "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

The Court in *Russello* declined to adopt a narrow construction of the term "interest," contained without limitation in § 1963(a)(1) of the RICO statute, based on a restricted definition of "interest" in the succeeding subsection (a)(2). As the Court stated: "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." 464 U.S. at 23; *see United States* v. *Naftalin*, 441 U.S. 768, 773 (1979) (the Court held that the phrase "upon the purchaser," found only in subsection (3) of § 17(a) of the Securities Act of 1933, should not be read into other subsections, observing: "The short answer is that Congress did not write the statute that way").

The foregoing principles of statutory construction were applied by this Court to an issue of personal jurisdiction in *Georgia* v. *Pennsylvania Railroad*, in which the Court held that the State of Georgia could not take advantage of the broad scope of process available in civil suits brought by the United States under §§ 4 and 5 of the Sherman Act. 324 U.S. at 467. Citing *Robertson* v. *Railroad Labor Board* (*see* Point I, *supra*), the Court concluded that in the absence of express Congressional authorization for suits by State governments, as opposed to the United States, "the jurisdiction of the district court is territorial." *Id.*

Based upon the principles enunciated in *Russello, Naftalin,* and *Pennsylvania Railroad*, this Court should reject Petitioners' argument that Congress intended to provide nationwide service of process for private claims under the CEA, where the requisite jurisdictional language was included in §§ 13a-1, 13a-2 and 18(d) of the CEA, but omitted from § 22 of the Act. Particularly in view of the infrequency of nationwide service of process provisions in federal statutes (*see* Point III, *infra*), there is no basis for implying nationwide service for private claims under the CEA—Congress simply "did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. at 773.

The holding of the Court below, refusing to apply the nationwide process provision of § 13a-1 of the CEA to private claims brought under § 22, is consistent with analogous decisions interpreting the scope of personal jurisdiction under the Clayton Act. The Clayton Act provides nationwide service of process only for claims against corporate defendants but not for claims against individuals and unincorporated associations. Thus, in *Catrone* v. *Ogden Suffolk Downs, Inc.*, 647 F. Supp. 850 (D. Mass. 1986), the court found that although § 12 of the Clayton Act provides nationwide service of process for corporate defendants, "[b]y its own terms, this provision is not applicable to individuals." *Id.* at 856. Accordingly, the court held that jurisdiction over the corporate defendants was properly exercised on the basis of the corporations' nationwide contacts, but that the individual defendants' amenability to jurisdiction must be evaluated under the terms of the Massachusetts long-arm statute, incorporated by reference in Rule 4(e) of the Federal Rules of Civil Procedure. *Id.*; *see Bamford* v. *Hobbs*, 569 F. Supp. 160, 167-68 (S.D. Tex. 1983); *California Clippers, Inc.* v. *United States Soccer Football Association*, 314 F. Supp. 1057, 1061 (N.D. Cal. 1970); *see also DeMelo* v. *Toche Marine, Inc.*, 711 F.2d at 1269 (the federal Longshoreman's Act provides nationwide service of process

for review of compensation awards by circuit courts, but not for the personal injury claims brought by plaintiff under the Act). The foregoing cases, as well as the decision of the Fifth Circuit below, properly decline to apply jurisdictional language from one section of a federal statute to cases arising under a different section of the same federal statute in which the jurisdictional language has been omitted.

C. Nationwide Service of Process Cannot Be Implied by Reference to the Federal Securities Statutes

Since Petitioners cannot rely on the jurisdictional provisions of the CEA to provide nationwide service of process for private actions, they ask the Court to adopt a nationwide amenability standard based on analogies to the federal securities statutes.[13] (*See* Pet. Br. at 29-30). Again, as a matter of statutory construction, where Congress has provided nationwide service of process for private claims in the securities laws but has omitted such language for private claims under the CEA, this Court should not "presume to ascribe this difference to a simple mistake in draftsmanship," *Russello* v. *United States*, 464 U.S. at 23; *see also Gravois* v. *Fairchild, Arabatzis*, [1977-1980] Comm. Fut. L. Rep. (CCH) ¶ 20,706, at 22,875 (E.D. La. 1978) (private claimants under the CEA cannot rely on nationwide service of process provisions contained in the federal securities statutes).

In addition, while the federal securities statutes and the CEA share some common regulatory goals, they are decidedly different on the issue of personal jurisdiction in the federal courts. The jurisdictional provisions of the securities acts state generally that the district courts may utilize nationwide service

13 Petitioners note that the district court initially held that the two securities acts, as well as the Commodity Exchange Act, authorize the exercise of *in personam* jurisdiction based upon a defendant's nationwide contacts. (Pet. Br. at 30, citing *Point Landing I*, Joint Appendix at 9). Petitioners fail to acknowledge, however, that the same district judge corrected himself in *Point Landing II* by holding that unlike the securities laws, "nationwide venue and service of process . . . is inapplicable to private causes of action" under the CEA. (Joint Appendix at 20).

of process for all actions commenced thereunder. 15 U.S.C. §§ 77v(a), 78aa. Therefore, once a private right of action under the securities acts was judicially held to exist, the jurisdiction of the district courts to hear that action and to assert power over those alleged to have violated the securities acts was already in place, and the same jurisdictional requirements applied to both administrative and private plaintiffs.

In the case of the CEA, however, the very opposite is true. Congress specifically limited the applicability of § 13a-1 to CFTC-commenced suits, and thus § 13a-1 creates personal jurisdiction only for cases brought by the CFTC. Section 13a-1 has no relationship to the assertion of personal jurisdiction over a defendant sued by private litigants such as Point Landing and the Omni Petitioners herein. Thus, while the federal securities acts provide nationwide service of process for all claims, regardless of the governmental or private status of the plaintiff, there is no correlative, all-encompassing provision in the CEA. Accordingly, Petitioners' analogies to the securities laws are misplaced.

Petitioners' attempt to create nationwide service of process for private causes of action under the CEA must be rejected as contrary to the terms and legislative history of the Act. In the absence of such statutory authorization of jurisdiction, Rule 4(e) requires that Wolff's amenability to jurisdiction be governed by state long-arm standards.

III.

FEDERAL RULE OF CIVIL PROCEDURE 4(e) MANDATES THE APPLICATION OF STATE LONG-ARM STANDARDS TO THE CEA CLAIMS ASSERTED AGAINST WOLFF

A. The Drafters of the Federal Rules Intended to Incorporate State Jurisdictional Standards Into Rule 4(e)

Where a case is before a federal court by reason of federal question jurisdiction, Rule 4(e) of the Federal Rules of Civil Procedure establishes the methods of process and the stand-

ards for asserting *in personam* jurisdiction over non-resident defendants:

> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Rule 4(e), which was last amended in 1963, carves out exceptions to the general rule of service set forth in the succeeding subsection 4(f), which provides that a federal summons may be served only within the forum state or in the 100 mile "bulge area."

According to the Advisory Committee Notes accompanying the 1963 amendments to the Federal Rules, the first sentence of Rule 4(e) refers to two types of federal statutes—(1) statutes such as the Interpleader Act, which provide for service of process upon non-residents and for the manner of service of process upon non-residents; and (2) statutes which provide for service of process upon non-resident defendants but not the manner of service. In circumstance (1), the first clause of the first sentence of Rule 4(e) holds that the non-resident defendant's amenability to jurisdiction and the manner of process are both governed by the terms of the particular federal statute giving rise to the district court's federal question jurisdiction.

In circumstance (2), the second clause of the first sentence of Rule 4(e) provides that the federal statute sued upon controls the non-resident's amenability to jurisdiction, but that the manner of service "may be made in a manner stated in Rule 4."[14] (*See* Advisory Committee Note to Rule 4(e)).

The second sentence of Rule 4(e), added by the 1963 amendments to the Federal Rules, governs federal question cases where the federal statute sued upon is silent as to service of process and the forum state's statutes or rules are used to effect service of process. This second sentence of Rule 4(e) is the provision applicable to the instant case because, as established in Point II *supra*, the CEA does not provide for service of process on non-resident defendants for private causes of action. In this circumstance, Rule 4(e) instructs the federal court that service under the forum state's statute or rule (typically the state long-arm statute) is to be made "*under the circumstances*" and in the manner prescribed in the statute or rule. (Emphasis added). The 1963 Advisory Committee Notes to Rule 4 state that the new second sentence of Rule 4(e) "expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on non-resident parties (as well as on domiciliaries not found within the State)." (Advisory Committee Note to Rule 4(e)).[15]

Law review articles written at the time of the 1963 amendments affirm the intent of the drafters of Rule 4(e) to incorporate state personal jurisdiction standards when state long-arm statutes are used to effect service. Benjamin Kaplan, who

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14 Fed. R. Civ. P. 4(c) and (d) provide different rules for the manner of service depending on the status of the party served, *e.g.*, an individual, an infant or incompetent, a domestic or foreign corporation, the United States, or a state or municipal entity.

15 In his dissenting opinion below, Judge Wisdom asserts that Rule 4 "has no necessary relation with the Courts acquiring personal jurisdiction." 795 F.2d at 429 (Joint Appendix at 54-55). However, the "under the circumstances" language of Rule 4(e) and the Advisory Committee Notes to the Rule clearly indicate that state jurisdictional standards were incorporated by reference in Rule 4(e).

served as Reporter to the Advisory Committee on Civil Rules, stated: "[T]he adoption in original federal actions of methods of securing personal jurisdiction of nonresidents furnished by the law of the state in which the district court is held . . . [has] been put on a clearer footing by amendments of Rules 4(e) and (f)." Kaplan, *Amendments of the Federal Rules of Civil Procedure*, 1961-1963(I), 77 Harv. L. Rev. 601, 621 (1964) (footnote omitted); *see also* Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Rule 4*, 38 N.Y.U. L. Rev. 1053, 1053-56 (1963) (the second sentence of amended Rule 4(e) "means that a federal court can avail itself of all of the procedural devices used in the parallel state court to get jurisdiction over any defendant not an inhabitant and not found in the state").

Since the enactment of the 1963 amendments to the Federal Rules, legal commentators have uniformly agreed that Rule 4(e) provides that where a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is used to effect service, a non-resident defendant's amenability to *in personam* jurisdiction is governed by the forum state's long-arm standards. For example, Wright & Miller's treatise on federal practice recognizes the "apparent intent of the draftsmen of Rule 4(e) to use state provisions for service in order to permit the federal courts in a state to hear those cases that could be brought in the state's own courts when a basis for asserting federal subject matter jurisdiction exists." 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1075, at 313 (1969); *see also* Fullerton, *Constitutional Limits*, 79 Nw. U. L. Rev. 1, 50 n.209, 56-57 & n.225 (1984); Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. at 132-35; Smith, *No Forum at All or Any Forum You Choose: Personal Jurisdiction Over Aliens Under the Antitrust and Securities Laws*, 39 Bus. Law. 1686, 1688, 1690-91 (1984) (hereinafter "Smith, *No Forum At All*"); Note, *National Contacts As a Basis for In Personam Jurisdiction Over Aliens in Federal Question Suits*, 70 Calif. L. Rev. 686, 686-87 (1982) (hereinafter "Note, *National Contacts*") ("absent a special federal rule or statute, federal courts are required under

Federal Rule of Civil Procedure 4(e) to confine their inquiry to the defendant's minimum contacts with the state in which the district court sits"); *see also* Siegel, Practice Commentaries on Fed. R. Civ. P. 4, 28 U.S.C.A., C4-27 at 46 (1960 & Supp. 1987) (hereinafter "Siegel, *Practice Commentaries*") ("How far subdivision (e) expands the reach of process in a given U.S. district court depends on how far the state in which it sits goes with long arm jurisdiction").[16]

There is strong historical support for the use of state long-arm standards by federal courts as prescribed by Rule 4(e). *See* Fullerton, *Constitutional Limits*, 79 Nw. U. L. Rev. at 45. The Judiciary Act of 1789, which established the federal trial and appellate courts, organized the trial courts into judicial districts drawn along state boundaries and limited process to the district in which the court was located. *See* Judiciary Act of 1789, Ch. 20 §§ 2, 11 (1789). According to Fullerton, the First Congress was sensitive to complaints about oppressive litigation in distant locations, which was regarded as a "greater oppression of the individual than any from which liberation

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16 In his dissenting opinion in *Point Landing IV*, Judge Wisdom suggests that the national contacts theory should be adopted under the authority of Federal Rule of Civil Procedure 83, which provides in relevant part that "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules . . ." *Point Landing IV*, 795 F.2d at 427-34 (Joint Appendix at 51-67). However, as noted by the district court in *Violet* v. *Picillo*, 613 F. Supp. 1563 (D.R.I. 1985) this is not a situation "not provided for by rule":

> [T]his is not simply a case of statutory construction where it falls to a court to interpret statutory ambiguity, or silence, in the manner suggested by the statute's legislative history and its purpose. Rather, by virtue of the approach prescribed by the Federal Rules of Civil Procedure regarding personal jurisdiction in federal question cases, this is an instance where congressional silence is assigned a presumptive meaning—namely, that the federal district courts will observe the territorial limits of the respective states in which they sit.

Id. at 1573. Moreover, the national contacts theory is inconsistent with the jurisdictional scheme prescribed by Rule 4(e). *See* Note, *National Contacts*, 70 Calif. L. Rev. at 699 n.68 (it is doubtful that Fed. R. Civ. P. 83 could serve as a basis for invoking the national contacts doctrine because "rule 4(e) clearly mandates state governance of the manner and circumstances of service when performed pursuant to a state long-arm statute.")

had been expected by the Revolution." Fullerton, *Constitutional Limits*, 79 Nw. U. L. Rev. at 33, 34 & n.156 (quoting J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 460 (1971)).

The Judicial Act of 1887 and the Judicial Code of 1911 continued to restrict federal court process to the boundaries of the federal judicial district in which the court was located, with rare exceptions provided by statutes which explicitly authorized nationwide service of process. *See* Act of March 3, 1887, Ch. 373 § 1; Act of March 3, 1911, Ch. 231 § 51. The adoption of the Federal Rules of Civil Procedure in 1938 significantly changed the scope of federal court process by allowing service of process on non-residents pursuant to a federal statute. The 1963 amendments to Rule 4 expanded process even further by allowing service of process beyond the state when a state long-arm statute permitted or when the defendant was found within 100 miles of the federal courthouse. *See* Fullerton, *Constitutional Limits*, 79 Nw. U. L. Rev. at 50 & n.209, 57 & n.228. Again, only in rare instances did Congress depart from the traditional process limits on federal courts set forth in Rule 4 by enacting nationwide service of process provisions in particular federal statutes. As Fullerton concludes, "The infrequency of nationwide personal jurisdiction statutes during the 200 years since the federal court system was organized" reflects the belief by Congress that "the interests of the federal government are in general adequately served when federal courts are subject to the same jurisdiction standards as state courts." *Id.* at 57.

B. The Fifth Circuit Below Correctly Interpreted the Provisions of Rule 4(e)

Consistent with the language of Rule 4(e), the intent of the rule to incorporate state long-arm standards, and the historical reliance on state jurisdictional boundaries by federal courts, the Fifth Circuit correctly held that where a federal statute does not provide for nationwide service of process, jurisdiction over a non-resident defendant can only be obtained by applying the long-arm statute of the state in which the district court

sits. *Point Landing IV*, 795 F.2d at 426-27 (Joint Appendix at 50). In reaching this result, the court relied on prior Fifth Circuit authorities in *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983) and *Burstein* v. *State Bar of California*, 693 F.2d 511 (5th Cir. 1982), which examined the language of Rule 4(e) and concluded that the clear import of the phrase "under the circumstances" in Rule 4 is that where a state long-arm statute is used to effectuate service of process "a federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it." *Burstein* v. *State Bar of California*, 693 F.2d at 514; *DeMelo* v. *Toche Marine, Inc.*, 711 F.2d at 1266.[17]

Petitioners criticize the decision of the Fifth Circuit below by arguing that Rule 4 is only a procedural provision for service of process—not jurisdiction—citing Justice Powell's statement in *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites* that Rule 4 "deals expressly only with service of process." Petitioners concede, however, that Justice Powell also characterized Rule 4 as a jurisdictional provision because "jurisdiction may not be obtained unless process is served in compliance with applicable law." 456 U.S. at 715 n.6 (Powell, J., concurring) (*See* Pet. Br. at 25-27).

Aside from relying on Justice Powell's opinion in *Insurance Corp. of Ireland*, Petitioners fail to offer any other support for their criticism of the Fifth Circuit's interpretation of Rule 4(e). Petitioners merely state, repeatedly, that the Fifth Circuit's application of state long-arm standards of jurisdiction in a federal question case is "inappropriate" and contrary to the

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17 The *en banc* court below, in approving the *DeMelo* and *Burstein* interpretations of Rule 4(e), resolved a conflict within the Fifth Circuit on the issue. *Point Landing IV*, 795 F.2d at 425, 427 (Joint Appendix at 45, 50). Petitioners' contention that the *DeMelo* holding is dicta because the case arose under both diversity and federal question jurisdiction (Pet. Br. at 34 n. 13) is incorrect. Had there been only diversity jurisdiction in *DeMelo*, the court would have looked no further than the forum state's standard of amenability to personal jurisdiction. The inquiry into the personal jurisdiction question was necessitated by the presence of federal question jurisdiction therein.

purpose of federal question jurisdiction. (Pet. Br. at 22, 24, 26, 27 n.11, 35). In fact, the holding of the Fifth Circuit below is not only appropriate, it is consistent with the language and intent of Rule 4(e), as set forth in detail above, to incorporate by reference state standards of personal jurisdiction when state methods of process are used by federal courts exercising federal question jurisdiction.

C. The Decision Below Is in Accord with All Other Circuit Court Decisions Which Have Ruled On This Issue

The court below expressly relied upon decisions of the Third, Ninth and District of Columbia Circuits in *Daetwyler, Wells Fargo*,[18] and *Kaiser* in support of its holding on the proper interpretation of Rule 4(e). *See Point Landing IV*, 795 F.2d at 426 (Joint Appendix at 47-49). Although not cited by the court below, the Seventh, Eighth and Second Circuits have also held that Rule 4(e) requires application of the forum state's long-arm standards of jurisdiction where the federal statute sued upon does not provide for service of process on non-resident defendants. *See Textor* v. *Board of Regents of Northern Illinois University*, 711 F.2d 1387, 1392 (7th Cir. 1983) (in a federal question discrimination suit, the court holds that in the absence of a federal long-arm statute, a court must look to the state long-arm statute to determine a non-resident's amenability to jurisdiction, which in turn requires minimum contacts between the forum state and the defendant); *Webber* v. *Michela*, 633 F.2d 518, 519 (8th Cir. 1980) (in a federal civil rights action, Rule 4(e) requires that personal jurisdiction over non-resident defendants be asserted under the forum state's long-arm statute); *Marsh* v. *Kitchen*, 480 F.2d 1270, 1272 n.6 (2d Cir. 1973) (in both federal question and diversity cases,

18 The holding in *Wells Fargo* has been recently confirmed by the Ninth Circuit in *Pacific Atlantic Trading Co.* v. *M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985) (in a suit arising under the district court's admiralty jurisdiction, the state long-arm statute must be applied to determine the defendant's amenability to suit in the forum). Additional authority in the Third Circuit can be found in *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981), relied upon by the *Daetwyler* court.

Rules 4(e)-(f) authorize a district court to look to state law to determine in what manner and under what circumstances a non-resident defendant can be subject to personal jurisdiction); *see also Handley* v. *Indiana & Michigan Electric Co.*, 732 F.2d 1265, 1271-72 (6th Cir. 1984) (in an action brought under the Jones Act and general maritime law, the Sixth Circuit analyzed the national contacts approach to personal jurisdiction, but ultimately grounded the assertion of *in personam* jurisdiction over the non-resident defendant on the defendant's contact with the forum state under the Kentucky long-arm statute); *Gkiafis* v. *Steamship Yiosonas*, 342 F.2d 546, 549 (4th Cir. 1965) (court holds that where state service of process procedures are used to effect service in a federal question case pursuant to Fed. R. Civ. P. 4, the court must evaluate the non-resident's contacts with the forum state to determine the propriety of exercising *in personam* jurisdiction).

D. The Overwhelming Majority of District Court Decisions Are Consistent with the Decision Below

In addition to the circuit court opinions cited above, there are an overwhelming number of federal district court decisions throughout the nation holding that Rule 4(e) mandates the application of state long-arm standards of personal jurisdiction where the federal statute sued upon does not provide for nationwide service of process. *See, e.g., Catrone* v. *Ogden Suffolk Downs, Inc.*, 647 F. Supp. at 854-55 ("Under Rule 4, in the absence of specific federal statutory or court rule authority providing for service of process . . . analysis under the Fifth Amendment due process standards for exercise of personal jurisdiction by a federal court in a federal question case turns to an interpretation of the state long-arm statute"); *Educational Testing Service* v. *Katzman*, 631 F. Supp. 550, 552 & n.6 (D.N.J. 1986) ("While this case arises under this court's copyright jurisdiction, service of process must be made subject to the New Jersey long-arm statute . . . ."); *Mitchell* v. *White Motor Credit Corp.*, 627 F. Supp. 1241, 1246 (M.D. Tenn. 1986) (court holds that in a federal question case, where state long-arm provisions are utilized to obtain service, the exercise

of *in personam* jurisdiction is limited to the terms of the long-arm statute); *Fogleman* v. *Aramco*, 623 F. Supp. 908, 910 (W.D. La. 1985) (in a case under the Jones Act, which does not provide for nationwide service of process, court holds that "when a party 'borrows' a state long-arm statute to attempt service of process, the party is bound by the state law restrictions that attach to the state long-arm procedure"); *Todd* v. *Tempest Marine, Inc.*, 623 F. Supp. 562, 564 (E.D. Mich. 1985) (the court cites the Sixth Circuit's decision in *Handley* for the proposition that where a federal statute does not contain a nationwide service of process provision, personal jurisdiction over non-resident defendants is evaluated under state long-arm standards); *Allen Organ Co.* v. *ELKA S.p.A.*, 615 F. Supp. 328, 329 (E.D. Pa. 1985) (in a patent infringement action, *in personam* jurisdiction over a non-resident defendant is evaluated under the Pennsylvania long-arm statute); *Colon* v. *Gulf Trading Co.*, 609 F. Supp. 1469, 1474-76 (D.P.R. 1985) (holding that a district court cannot exercise nationwide personal jurisdiction in federal question cases "unless Congress, or the Supreme Court, grants the authority to implement this jurisdictional power"); *Wehner* v. *Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 28-29 (E.D. Mo. 1985) (in an action under the Comprehensive Environmental Compensation and Liability Act ("CERCLA"), which does not provide for nationwide service, Rule 4(e) requires that the defendant's amenability to jurisdiction be determined by Missouri jurisdictional standards); *Wylie* v. *Mobil Oil Corp.*, No. S84-0384, slip op. (S.D. Miss. Aug. 29, 1985) (because the federal maritime statute does not provide for nationwide service of process, amenability to jurisdiction must be assessed under the Mississippi long-arm statute); *Violet* v. *Picillo*, 613 F. Supp. at 1573 (because CERCLA does not provide for nationwide service of process, the defendant's amenability to personal jurisdiction must be determined under the state long-arm statute); *Starline Optical Corp.* v. *Caldwell*, 598 F. Supp. 1023, 1025 (D.N.J. 1984) (in a federal question patent case, the court held that Rule 4(e) requires the use of the state long-arm statute to determine the question of *in personam* jurisdiction over a non-resident defendant); *Mu-Petco Shipping Co.* v. *Divesco, Inc.*, 101 F.R.D.

753, 755 (S.D. Miss. 1984) (in a case based on the admiralty jurisdiction of the federal court, amenability to jurisdiction is governed by the state long-arm statute where the federal statute does not provide for service of process); *Bamford* v. *Hobbs*, 569 F. Supp. at 164, 167-68 ("Because the Clayton Act does not provide for service of process on individuals, the propriety of service of process on [the non-resident defendant] must be gauged by the requirements of the applicable Texas long-arm statute . . . "); *Medeco Security Locks, Inc.* v. *Fichet-Bauche*, 568 F. Supp. 405, 409-10 (D. Va. 1983) (in a patent infringement action, the court expressly rejects the aggregate national contacts theory, holding that the theory violates the alien defendant's Fifth Amendment due process rights); *Liaw Su Teng* v. *Skaarup Shipping Corp.*, No. 81-1603, slip op. at 4-5 (E.D. La. Apr. 18, 1983) (in a suit brought under the federal maritime laws, the district court held that where federal statutes are silent as to service of process, amenability to jurisdiction must be measured by state long-arm standards); *Gemini Enterprises, Inc.* v. *WFMY Television Corp.*, 470 F. Supp. 559, 563 (M.D.N.C. 1979) (in a federal question conspiracy case, court holds that where state service of process methods are utilized pursuant to Fed. R. Civ. P. 4(e), "the validity of service made pursuant to state law is measured by statutory and constitutional standards applied to judge service by state courts"); *Superior Coal Co.* v. *Ruhrkohle, A.G.*, 83 F.R.D. 414, 418-20 (E.D. Pa. 1979) (national contacts theory rejected because no federal statute authorizes district courts "to take nationwide contacts into consideration and thereon to assume jurisdiction over alien corporations"); *Amburn* v. *Harold Forster Industries, Ltd.*, 423 F. Supp. 1302, 1304-05 (E.D. Mich. 1976) (in the absence of authority in the patent statute for nationwide service of process, the court limited consideration of defendant's minimum contacts to the forum state); *Graham Engineering Corp.* v. *Kemp Products, Ltd.*, 418 F. Supp. 915, 919-20 (N.D. Ohio 1976) (in the absence of Congressional authority for a uniform federal amenability standard in federal question cases, a district court in a patent action must look to the state long-arm statute to assert jurisdiction over a non-resident defendant);

Ag-Tronic, Inc. v. *Frank Paviour Ltd.*, 70 F.R.D. 393, 401 (D. Neb. 1976) (unless the federal statute sued upon provides for nationwide service of process, the court would decline to invade the province of Congress by aggregating nationwide contacts of an alien defendant); *Stanley Works* v. *Globemaster, Inc.*, 400 F. Supp. 1325, 1337-38 (D. Mass. 1975) (service under constitutionally valid long-arm statute in federal court in a federal question case is only possible where the in-state activities of the defendant would be sufficient to invoke the long-arm statute had defendant been sued in state court); *Bernard* v. *Richter's Jewelry Co.*, 53 F.R.D. 606, 607 (S.D.N.Y. 1971) (where the Federal Truth in Lending Act does not provide for nationwide service of process, Rule 4(e) of the Federal Rules of Civil Procedure provides that the non-resident must be amenable to jurisdiction under the forum state's long-arm statute); *California Clippers, Inc.* v. *United States Soccer Football Association*, 314 F. Supp. at 1061 (in an antitrust action against an unincorporated association, the Clayton Act does not provide for nationwide service and thus the defendants can only be subject to jurisdiction under the California long-arm statute); *Edward J. Moriarty & Co.* v. *General Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967) (use of the nationwide contacts theory is not permitted by the Federal Rules or statutes because "neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimal contacts with the United States").

E. The District Court Decisions Cited by Petitioners Are Not Controlling on the Proper Interpretation of Rule 4(e)

In lieu of the jurisdictional standards mandated by Rule 4(e), Petitioners advocate the substitution of a "national" or "aggregate contacts" approach to personal jurisdiction in federal question cases whereby an alien defendant's contacts with the United States are aggregated to form a basis for personal jurisdiction even though the federal statute sued upon does not provide such broad jurisdictional authority. Conspicuously

absent from Petitioners' brief is any attempt to address the overwhelming number of cases cited above which reject this nationwide amenability theory of jurisdiction. Instead, Petitioners primarily rely upon the decision of the district court in *Cryomedics, Inc.* v. *Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975) (Pet. Br. at 18-21), which used an aggregate national contacts standard in a patent infringement action. The *Cryomedics* court focused its analysis on constitutional principles of fairness under the Fifth Amendment and completely ignored Rule 4(e) and the need to find statutory authorization for the assertion of *in personam* jurisdiction, either in the Federal Rules of Civil Procedure or in the federal patent laws. As such, the *Cryomedics* decision contravenes the principle set forth by this Court in *Robertson* v. *Railroad Labor Board* that federal courts must have statutory authorization to exercise personal jurisdiction over non-resident defendants. (Point I, *supra*).

Not surprisingly, the faulty analysis of the *Cryomedics* decision has been expressly rejected by federal circuit and district courts throughout the country, as well as by legal commentators, as contrary to the language and intent of Rule 4(e). For example, the Ninth Circuit in *Wells Fargo & Co.* v. *Wells Fargo Express Co.* extensively analyzed the *Cryomedics* decision and concluded that it was "of dubious validity." 556 F.2d at 416. The *Wells Fargo* opinion also noted that two of the cases relied on by the *Cryomedics* court did not actually support the theory of adopting an aggregate national contacts approach, 556 F.2d at 417-18 & n.9 (discussing *Edward J. Moriarty & Co.* v. *General Tire & Rubber Co.*, 289 F. Supp. 381 (S.D. Ohio 1967) and *Holt* v. *Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973)).[19]

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19 In his dissenting opinion below, Judge Wisdom notes that *Cryomedics* did not "blast off without authority," referring to *Cryomedics'* citation of *Holt* v. *Klosters Rederi* and *Edward J. Moriarty Co.* v. *General Tire & Rubber Co. See Point Landing IV*, 795 F.2d at 432 (Joint Appendix at 63). Likewise, Petitioners herein rely on *Moriarty* and *Holt* in support of the national contacts theory. (Pet. Br. at 9 n.10). Like the *Cryomedics* decision, *Holt* completely ignores the statutory requirements for asserting *in personam*

(Footnote continued on following page)

The district court in *Medeco Security Locks, Inc.* v. *Fichet-Bauche* rejected application of the *Cryomedics* aggregate contacts theory in a patent infringement action, concluding that "This court is unpersuaded by the rationale of the *Cryomedics* court . . ." 568 F. Supp. at 410. Similarly, in *Activox, Inc.* v. *Envirotech Corp.*, 532 F. Supp. 248 (S.D.N.Y. 1981), the Southern District of New York expressly declined to adopt the *Cryomedics* analysis in a patent case because it would render the jurisdictional provisions of the federal patent laws superfluous. *Id.* at 250. For other cases expressly rejecting the *Cryomedics* decision, *see Ag-Tronic, Inc.* v. *Frank Paviour Ltd.*, 70 F.R.D. at 400-401 (if *Cryomedics* stands for the proposition that a court can rely on nationwide contacts where Congress has not provided for nationwide service of process, "this court declines to follow its precedent"); *Graham Engineering Corp.* v. *Kemp Products Ltd.*, 418 F. Supp. at 919 & n.3 (the court criticized *Cryomedics* for failing to discuss the statutory source of jurisdictional authority for the nationwide contacts approach); and *Ingersoll Milling Machine Co.* v. *J.E. Bernard & Co.*, 508 F. Supp. 907, 910 & n.4 (N.D. Ill. 1981) (the court declines to adopt the broad jurisdictional approach set forth in *Cryomedics*).

A number of legal commentators have concurred with the foregoing judicial disapproval of the *Cryomedics* decision. For example, the *Cryomedics* opinion has been criticized for having "ignored the requirement of a statutory authorization for *in personam* jurisdiction." Cohen, *In Personam Jurisdiction*, 14 Den. J. Int'l L. & Pol'y at 70. Cohen concludes that the reasoning in *Cryomedics* is "flawed" because "To rely on a state long-arm statute for extraterritorial service of process . . . but to ignore the circumstances under which it may be invoked (*i.e.*, the presence of appropriate minimum contacts with the state), is a plain misapplication of Rule 4(e)." *Id.* at 68-70.

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jurisdiction. The *Holt* decision also relies heavily on *Moriarty*, which *expressly declined* to adopt the nationwide contacts approach. 289 F. Supp. at 390.

Cryomedics was likewise described as flawed by another legal commentator because the opinion glossed over the more difficult statutory requirements for personal jurisdiction and only considered the constitutional basis for exercising personal jurisdiction. *See* Smith, *No Forum at All*, 39 Bus. Law. at 1688-91. According to Smith, "The flaw in the *Cryomedics* opinion lies in its assumption that, because the 'jurisdictional reach' of Connecticut courts has been extended to the 'constitutional limits,' the only remaining question is what are the constitutional limits upon a federal district court sitting in Connecticut." *Id.* at 1689-90. Smith concludes that "[t]he national contacts theory, as applied in *Cryomedics*, is not supported by the language of the federal rules." *Id.* at 1691; *see also* Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv. L. Rev. 470, 481 (1981) (criticizing *Cryomedics* as having weak support for adoption of the aggregate contacts theory).

The handful of district court opinions cited by Petitioners in addition to *Cryomedics* (Pet. Br. at 18-19 n.10) do not support the proposition that Rule 4(e) authorizes the use of aggregated national contacts in federal question cases where the federal statute sued upon does not provide for nationwide service of process.[20] In *Alco Standard Corp.* v. *Benalal*, 345 F. Supp. 14, 24-25 (E.D. Pa. 1972), the non-resident defendant was sued under the 1933 and 1934 securities statutes, which expressly provide for nationwide service of process. The federal statute sued upon in *Centronics Data Computer Corp.* v. *Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977)—the antitrust

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20 Petitioners state that the Seventh Circuit recognized the existence of the national contacts approach in *Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137, 1143 n.2 (7th Cir. 1975) (Pet. Br. at 18 n.10), but concede that the Seventh Circuit did not reach the national contacts issue in *Honeywell*. The *Textor* case cited above shows that the Seventh Circuit ultimately declined to adopt the national contacts theory. While Petitioners also rely on *Lapeyrouse* v. *Texaco, Inc.*, 693 F.2d 581 (5th Cir. 1982) (overruled by *Point Landing IV*, 795 F.2d at 427, Joint Appendix at 50) (*see* Pet. Br. at 36 & n.14), the *Lapeyrouse* court did not aggregate the nationwide contacts of the non-resident defendant but in fact based personal jurisdiction on the defendant's contacts with the forum state. 693 F.2d at 586-87.

laws—likewise provide for nationwide service of process in suits against corporate defendants. The remaining causes of action in *Centronics* were state contractual, trade secret and defamation claims, which were before the court by virtue of diversity jurisdiction, not federal question jurisdiction. *Id.* at 660. In addition, the *Centronics* court predicated the exercise of personal jurisdiction over the non-resident defendant on the defendant's activities outside the state of New Hampshire that caused effects within the state, and thus came within New Hampshire's long-arm statute. *Id.* at 665-67.

The opinion in *First Flight Co.* v. *National Carloading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1962), is inapposite because the case *preceded* the 1963 amendment to Rule 4(e), which added the "under the circumstances" language that confirmed the need to refer to state long-arm standards when state service of process methods are used. *See DeMelo* v. *Toche Marine, Inc.*, 711 F.2d at 1268 (rejecting an earlier Fifth Circuit decision because it relied on pre-1963 interpretations of Rule 4(e)).

In sum, the few district court cases relied upon by Petitioners in support of the "aggregate contacts" theory of *in personam* jurisdiction are either distinguishable or have been widely discredited. Moreover, Petitioners fail to address the vast body of case law on the circuit and district court level which, as discussed in detail above, rejects the judicial creation of a federal long-arm statute advocated by Petitioners. The *en banc* decision of the Fifth Circuit below correctly followed the well-established legal principles set forth in this body of case law which adheres to the intendment of Rule 4(e). Accordingly, the decision below should be affirmed.

IV.

THE NATIONAL CONTACTS THEORY VIOLATES THE SEPARATION OF POWERS DOCTRINE

Petitioners contend that public policy requires the adoption of a national contacts jurisdictional standard. (Pet. Br. at 9, 10, 17, 21, 28, 30). They argue that "Congress has created a broad federal scheme under the CEA for the regulation of commodities markets," and that the application of state jurisdictional standards to private actions under the Commodity Exchange Act "wre[a]ks havoc on the rights of federal litigants." (Pet. Br. at 22).

Wolff respectfully submits that Petitioners present their policy argument to the wrong forum. As set forth in Points II and III, *supra*, Congress has *not* provided for jurisdiction over Wolff. While Petitioners may wish that the law were otherwise[21], their entreaties should be addressed to the legislative, rather than the judicial, branch of government. The United States Supreme Court is not a policy-making body. The Court has so recognized on numerous occasions. *See, e.g., Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) ("it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," quoting *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963)); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 n.12 (1976) (the argument that enforcement of the Securities Exchange Act will be hampered if geographically dispersed defendants cannot be sued in one proceeding is more appropriately addressed to Congress than the Supreme Court); *Evans* v. *Abney*, 396 U.S. 435, 447 (1970) ("The responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.")

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21 Petitioners inquire, "should a federal court look to the state for the standard in determining personal jurisdiction in a purely federal question case? We think not." (Pet. Br. at 24). Obviously, more than just "thinking not" is necessary to authorize the assertion of *in personam* jurisdiction over Wolff.

Once Congress addresses an issue, "the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95 n.34 (1981); *see also United States* v. *National City Lines, Inc.*, 334 U.S. 573, 588-89 (1947) (the Court refused to apply the doctrine of *forum non conveniens* to negate the venue provision of the Clayton Act, holding that "[o]ur general power to supervise the administration of justice in the federal courts does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue." (citations omitted)).

In urging this Court to adopt a jurisdictional theory rejected by Congress, Petitioners ignore the constitutional safeguard of separation of powers. This doctrine applies with particular force where the jurisdiction of the federal courts is at issue. As the court below observed, "That federal courts should determine their own personal jurisdiction is a proposition fundamentally at odds with our government of separated powers." *Point Landing IV*, 795 F.2d at 423 (Joint Appendix at 41).

Numerous authorities have recognized that adoption of the national contacts approach to *in personam* jurisdiction requires Congressional approval, either by statutory reform or by amendment of the Federal Rules of Civil Procedure[22]. In the recent decision of *Asahi Metal Industry Co.* v. *Superior Court of California*, 107 S. Ct. 1026 (1987), for example, Justice O'Connor noted:

> We have no occasion here to determine whether *Congress* could, consistent with the Due Process Clause of the Fifth

22 While the Supreme Court has the power to prescribe rules of procedure for federal courts, rules promulgated by the Court cannot take effect until ninety days after they are reported to Congress, 28 U.S.C. § 2072. Thus, Congress retains the ultimate authority to reject proposed amendments to the Federal Rules of Civil Procedure. Congress recently demonstrated its willingness to exercise this authority by rejecting certain amendments which were proposed in 1982. *See* Siegel, *Practice Commentaries*, C4-6 at 24.

> Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

Id. at 1033 n. ** (emphasis added) (joined by Rehnquist, CJ., Powell and Scalia, JJ.); *see* Note, *National Contacts*, 70 Calif. L. Rev. at 698-99 (uniform application of the national contacts doctrine to alien defendants requires structural reform consisting of an amendment to the Federal Rules of Civil Procedure or a special alien jurisdiction statute); Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. at 117, 151 (a statute or amendment to the Federal Rules of Civil Procedure is required to make the national contacts doctrine generally available to the federal courts); *see also* Cohen, *In Personam Jurisdiction*, 14 Den. J. Int'l L. & Pol'y at 60, 73; Smith, *No Forum at All*, 39 Bus. Law. at 1703, 1704.

In considering the import of the separation of powers doctrine to the present case, it is also significant that the rights and obligations of aliens are at issue. This Court has expressly declared that the responsibility for regulating the relationship between the United States and citizens of foreign nations lies with the political branches of the federal government. As stated in *Matthews* v. *Diaz*, 426 U.S. 67 (1976), decisions concerning aliens "may implicate our relations with foreign powers, and . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Id.* at 81; *see also Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), in which the Court stated:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. at 589.

Moreover, the assertion of personal jurisdiction over alien defendants involves particularly delicate and complex policy issues:

> Because exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, these claims can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields. Equally important, exorbitant jurisdictional claims can frustrate diplomatic initiatives by the United States, particularly in the private international law field. Most significantly, these claims can interfere with United States efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states.

See Born, *Reflections on Judicial Jurisdiction in International Cases*, to be published in 17 Ga. J. Int'l J. Comp. L. 1, 29 (1987); *see also* Fullerton, *Constitutional Limits*, 79 Nw. U. L. Rev. at 59 (federal government's interest in suits involving foreign citizens is "fraught with diplomatic and international law overtones").[23]

The impact of Petitioners' aggregate contacts theory on alien defendants is far-reaching. Although Petitioners couch their argument in support of the national contacts theory in terms of the policy demands of the CEA, Petitioners' theory cannot be confined to one statute. Taking Petitioners' position to its logical conclusion, the scope of personal jurisdiction would be significantly expanded in *all* suits against alien defendants brought under federal statutes which are silent as to service of process. Thus, the Fifth Circuit below observed that the *Daetwyler* court "implied that if the national contacts theory is accepted, it in effect reads a nationwide service of process

23 As set forth in note 12 *supra*, the legislative history of the Futures Trading Act of 1986 demonstrates that Congress expressly acknowledged the need for restraint in authorizing extraterritorial service of process upon foreign citizens residing abroad. *See* 7 U.S.C. § 15; H. Conf. Rep. No. 995, 99th Cong., 2d Sess. 22, *reprinted in* 1987 U.S. Code Cong. & Admin. News 6066, 6067.

provision into all federal laws when an alien is a defendant." *Point Landing IV*, 795 F.2d at 426 (Joint Appendix at 48).

Petitioners offer no justification for asking this Court to create universal nationwide process in all federal question cases, other than the subjective policy judgment that such a decision would, allegedly, strengthen regulatory enforcement of the commodities laws. However, there are numerous federal statutes other than the CEA which have similar regulatory or remedial objectives, but for which Congress did not provide nationwide service of process. Such federal statutes include Title VII of the Civil Rights Act, the federal patent, copyright and trademark laws, the Labor Management Relations Act, the Fair Credit Reporting Act, the Truth in Lending Act, and claims against individuals and unincorporated associations under the Clayton Act. Under the rationale of Petitioners' aggregate contacts theory, nationwide service of process would be judicially read into these federal statutes, as well as the innumerable federal statutes which do not provide for nationwide service of process. Such a radical alteration of the jurisdiction of federal courts must be left for Congress.

In addition, whatever the potential benefits perceived by Petitioners, the national contacts theory unquestionably increases the risk that non-resident defendants will be forced to litigate in a forum distant from their place of residence.[24] Indeed, it is precisely because of the potential for hardship and inconvenience to defendants that Congress often enacts restrictive venue provisions to counterbalance statutory grants of nationwide personal jurisdiction. *See* Fullerton, *Constitutional Limits*, 79 Nw. U. L. Rev. at 74. Such a weighing of interests is a task for the legislative, rather than the judicial branch of government.

24 Wolff disputes Petitioners' self-serving conclusion that respondents would not be "unduly burdened by a suit in a federal court sitting in Louisiana" (Pet. Br. at 21), especially in view of Wolff's *de minimis* contacts with the State. Furthermore, the issue before this Court is the absence of statutory authority for the exercise of jurisdiction over Wolff, wholly apart from any questions of burdensomeness.